RULINGS

OF THE

COURT OF SUDDER UDALUT,

CONTAINED IN THE DECISIONS

PASSED BY THEM DURING THE YEARS

1850 TO 1857.

COMPILED BY

S. VEJIARAGAVOOLOO CHETTY,

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MADRAS:

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1858.

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Reports
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TO

THE JUDGES OF THE COURT OF SUDDER UDALUT.

THIS COMPILATION

OF

THEIR RULINGS

IS,

WITH PERMISSION,

MOST RESPECTFULLY DEDICATED

BY

THEIR OBEDIENT AND HUMBLE SERVANT,

S. VEJIARAGAVOOLOO CHETTY.

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PREFACE.

The necessity of some such Compilation as the present frequently presented itself to the writer's mind, during his employment in the Judicial Department. The decisions of the Sudder Udalut contain several important Rulings which would be of great use to Judges and Pleaders not only in assisting them in the discharge of their duties but also in avoiding errors which the Higher Tribunal has authoritatively corrected; but they are so spread through several monthly volumes without any sort of Index that it is impracticable to refer to them without losing considerable time in reading page after page. The volumes themselves have had so small a circulation that the District Moonsiffs have none in their Courts to refer to and cannot now be furnished with them except at a great expense. The object of this book is to supply these wants.

2. The book contains true Extracts of such parts of the Decrees as contain the Rulings and would make them clear; in cases of importance the entire Decrees have been printed. The page of the monthly volumes of the Printed Decisions of the Sudder Udalut is also given at the head of each extract to make reference to the full Decree easy. The Table of Contents contains all the Rulings in abstract in the order of the dates, and they are again alphabetically arranged in a full Index which would make reference to any of them at a very short notice exceedingly easy.

3. The compiler has commenced with 1850, because it is from that year that the printed decisions of the Sudder Udalut are available, and he has for the present closed with 1857. It is his intention to publish abstract translations in Tamil and Teloogoo of the present compilation, and to continue similar publications for subsequent Decrees once in two or three years.

4. This compilation will be found to contain several Rulings highly useful to Revenue Officers, and even to Military Courts of Requests.

MADRAS,
15*th November* 1858.

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ERRATA.

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14 Para 11, last line, add "to" before the word considering.

51 Para 4, fifth line, for "raliance" read "reliance."

75 Para 13, eighth line, for "district" read "distinct."

87 Para 3, fifth line, for "ceremonious" read "ceremonies."

113 Second line, for "institude" read "institute."

116 Para 13, first word, for "At" read "As."

118 Para 6, third line, for "bassed" read "based."

125 Para 3, first line, for "mootty" read "moofty."

135 Para 2, third line, for "personality" read "personalty."

145 Para 7, ninth line, for "observe" read "observed."

152 Ninth line, for "impractable" read "impracticable."

241 Third last line, for "Page 3" read "Page 38."

ABBREVIATION.

M. V. Monthly Volumes of the printed decisions of the Sudder Udalut.

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Rulings of the Court of Sudder Udalut contained in the Decisions passed by them during the years 1850 *to* 1857.

1850.

No. 60 of 1847.

Decree dated 31st January 1850, *Page* 11 *M. V.*

13. The Court of Sudder Udalut are of opinion, that, as the stipulations of the principal Bond for 200 pagodas, were, that the land should be enjoyed by the mortgagee in lieu of Interest, and should be restored to the mortgager on repayment of the Principal lent, and as, according to the calculation made by the District Moonsiff in the original suit, on the evidence adduced, and confirmed by the Principal Sudr Ameen in appeal, the profits derived by the defendants (special Appellants) in each year, fell short of the annual legal Interest on the said Principal, and therefore no portion of the Principal itself has been liquidated thereby, the plaintiff (special Respondent) should recover the mortgaged lands, i. e. the $8\frac{75}{128}$ cawnies adjudged by the lower Courts, on repayment of the Principal of the 2 Bonds, viz. 275 pagodas, and not otherwise.

14. The special Appellants having under the terms of the Deed, accepted the usufruct in lieu of Interest for an indefinite period, have, of course, no right to demand any thing more, although the profits may have been below the legal rate of Interest.

15. The Court are supported in the above view, by case 120 (and the note appended thereto) at page 470 of Morley's reported cases.

No. 10 of 1850.

Decree dated 28th March 1850, *Page* 14 *M. V.*

5. The Court of Sudder Udalut remark that the Courts of this country being quite as much Courts of Equity as Courts of Law have always re-

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cognized the right of a party to assign over a Bond for a valuable consideration, without requiring the obligee to be of necessity a party to the same, and they resolve to remand the suit for a rehearing by the Civil Judge, who will, on a reconsideration of the record, pass such judgment on the merits of the case as he may deem just and proper.

No. 61 of 1847.

Decree dated 1st July 1850, *Page 27 M. V.*

Para 1. In the Original Suit the Plaintiff (Appellant) sought to recover from Defendant (Respondent) Rupees 93,822-4-10 being principal and balance of Interest up to 15th January 1838, the subsequent interest up to filing of action being foregone, due on a Mortgage Bond and agreement for Rupees 73,500 executed on the 6th Pungoony of Vizia, or 17th March 1827, by the father of the Defendant, the late Vencatapermal Rajah, Bahadur, Zemindar of Cartvatenugger, in favor of the late Vencatasa Naick, father of the Plaintiff.

2. The particulars of the original transactions, together with the execution of the documents A and B, on which the action is grounded, are described and admitted by the respective parties, as also are the facts of 11 and subsequently 2 more Villages having been made over by the Defendant's father to the father of the Plaintiff, in order that by the usufruct the abovementioned obligations might be discharged. The Plaintiff then shows that these Villages were enjoyed by his late father and by himself up to the 30th October, of Fusly 1238, when the Collector attached the Villages on account of the succession of the Defendant, then a minor, to the Zemindary—that he (Plaintiff) made repeated applications for the release of the Villages, and for the usufruct being restored to him, under the terms of his mortgage, which demand was not complied with until the 17th April 1831; that he then also made a demand for the entire collections, that had been realized by the Collector during the attachment, but this not being complied with, he sued the Collector and the Defendant for the amount. The Provincial Court of the Centre Division rejected his claims, leaving it open to him to file a Suit against the present Defendant for the entire sum still due; against this award he had appealed, but the Decree of the Lower Court being confirmed by

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the Court of Sudder Udalut, he had now sued the Defendant who resumed the Villages on the 16th January 1838 for the balance due with interest, as above stated and for the recovery of the same by the sale of the mortgaged Villages.

8. The Civil Judge in passing his Decree observes that "the whole "question for decision is the interpretation to be placed on the provi-"sions of Section VIII, Regulation XXXIV of 1802, as there is no "doubt or dispute that the Plaintiff enjoyed first 11 and then 13 Villages "included in the Defendant's Zemindary, and that their produce during "ten years was sufficient to discharge the principal of the bond with "legal interest, provided interest was allowed on the usufruct;" and after a long argument to shew why he considered that under the provisions of the Section above quoted counter interest should be allowed on the entire usufruct receipts, on those grounds considered the Bond with interest discharged and therefore dismissed the plaint ordering all costs to be paid by Plaintiff.

15. In respect to the 2nd point* the Court of Sudder Udalut are distinctly of opinion that the Civil Judge has mistaken the intent and meaning of Sections IV and VIII, Regulation XXXIV of 1802. In the first place as regards the question whether the entire amount paid as interest on a Bond, can, when the Bond comes to be litigated in Court, be considered as a part of the interest to which Section IV applies —and next in regard to Section VIII, which he supposes to authorize the calculation of interest upon the entire receipts arising from a usufruct mortgage. The Court of Sudder Udalut in Special Appeal Suit No. 18 of 1848 laid down as their interpretation of the provisions of Section IV Regulation XXXIV of 1802 that a sum equal to principal is recoverable as interest, exclusive of payments made, and with respect to Section VIII, they are of opinion that in usufruct mortgages, where the receipts do not exceed the rate of interest entered in the Bond, provided such is not in excess of the legal rate, those receipts must be calculated as simple current interest, and which cannot be considered as accumulating with compound interest towards the liquidation of the principal debt; and further, that it is only where the receipts exceed the legal interest

* "The intent and meaning of Sec. IV, Regn. XXXIV of 1802, and whether counter-interest on the usufruct collections should, under the provisions of Sec. VIII Regn. XXXIV of 1802 be credited to the Respondent."

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or the rate mutually agreed upon, that any liquidation of the original debt can take place.

16. These two points being thus disposed of, the Court of Sudder Udalut consider with reference to their interpretation of the provisions of Sections IV and VIII of Regulation XXXIV of 1802 the account between the parties to stand as follows :

* * *

and do therefore reverse the Decree of the Lower Court, and award to the appellant to recover from the Respondent the amount sued for being Rupees 93,822-4-10 with interest on the original debt from the date of filing the Suit up to this date. (*a*)

No. 23 of 1849.

Decree dated 29th August 1850. *Page* 61 *M. V.*

1. The suit was laid at Company's Rupees 24,773—1 qrs. 79¾ reas.

2. The particulars are thus stated by the Civil Judge—" The Plaintiff sues for the recovery of ⅓rd. share of the immoveable property, outstanding debts, and ready cash allotted to his mother, the 1st Defendant, on a division made of that left by his father, the deceased Bis Ram Misrayer, and estimated at Rupees 24,773-1 qrs. 79¾ reas as per list tendered with the plaint, upon his giving sufficient security to his mother, or to the Court, for paying her regularly the income of the said property for her maintenance, or for obliging her to give in an account of the property and furnish security so as to prevent its dissipation ; she possessing no authority, during her life time, to alienate the property set apart for her maintenance ; having merely a life interest therein ; and which is to descend to him and to his brothers, the 2nd and 3rd Defendants, in equal shares, upon her demise."

3. " In her answer, which Plaintiff declares to have been fraudulently entered in her name, 1st Defendant admits that, of the property, which fell to her share, estimated at Rs. 88,095-1-58½, she, of her own accord, gave a portion to the 3rd Defendant and the remaining portion (gold and silver ornaments excepted), estimated at Rupees 46,086-1-29, to the 2nd

(*a*) *Usury Laws, repealed by Act XXVIII of* 1855.

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Defendant, on condition that he should realize the recoverable outstanding debts and support her therewith until her demise; and further states that Plaintiff has no right whatever to the property falling to her share."

4. The 2nd Defendant supported the 1st Defendant's answer and observed that the Plaintiff, if he had any objection to the 1st Defendant disposing of her property in the way she did, ought to have urged the same at the time she did so, and when the deed conveying the property was registered.

5. The 5th Defendant admitted having bought from the 1st Defendant a Bankshall No. 30 for Rupees 2,000.

7. The Civil Judge in recording his judgment says, "on reference to the Probate of the late Bis Ram Misrayer's will, produced and subsequently filed agreeably to its instructions by 2nd Defendant's Vakeel, it finds that Plaintiff and 1st to 3rd Defendants are therein declared "to be the only heirs to his estates and that no other person shall have any right whatever to them." Provision is likewise made for a division of the said property in the event of any disagreement arising among the four heirs abovementioned—but no prohibition of any kind is to be found as to the disposal of their respective shares. As however Plaintiff so strongly urges that any such alienation by 1st Defendant is contrary to the Dhurmasaster and the usage of their caste, the Court submitted to the Pundits of the Sudder Udalut "whether according to the Hindoo Law she was at liberty to dispose *ad libitum* of her share, either during her life-time or at her death, or whether such must descend to her sons in equal proportions at her demise." In their reply which they support by texts from different authorities it is stated that "she is competent to enjoy and dispose *ad libitum* of the personal property and the yearly produce of the real estate; she cannot however alienate the immoveable property by sale, gift or otherwise. After her death, her sons shall divide in equal proportions the real estate and such portion of the personal property as may remain after what she expended."

8. The Civil Judge on the above exposition of the Law non-suited the Plaintiff, as respects his claim to the personal property, but declared that the sale of the mortgage right of the land Nos. 20 and 21 to the 4th Defendant, which was admitted, and the Bankshall to the 5th Defend-

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ant was null and void. He assessed the parties with their respective costs.

9. From this decision the 2nd Defendant appealed, stating among other objections, that the question of the Civil Judge had not been fully and clearly put to the Law Officers of the Court, inasmuch as the disagreement existing between the Plaintiff and the 1st Defendant had not been mentioned, and that, had it been so, their reply would have been different. The Appellant further objected to being saddled with the costs of that portion of the Suit which he had successfully defended.

10. The Court of Sudder Udalut propounded a further question to the Pundits, viz. whether the division of a female of her property *ad libitum* among her sons, who were on good terms with her, to the exclusion of another son, who had quarreled with her, was borne out by law, and their reply was precisely similar to their former one, that a widow had no power over real property, which at her decease must descend to her sons in equal proportions.

11. The Court of Sudder Udalut therefore, affirm the decision of the Civil Judge, but are of opinion that the costs incurred in the Lower Court must be borne by the parties cast, in proportion to the amount awarded and disallowed. The same is accordingly ordered.

No. 29 of 1850.

Decree dated 29th August 1850. *Page* 65 *M. V.*

13. The Court of Sudder Udalut deem it proper to observe that the Regulation cited as one of the grounds of non-suit does not apply to the case; the Regulation in question (IV of 1831) refers to grants of money or land revenue conferred by the Government; whereas this Suit was instituted for the recovery of lands held from the Jaghiredar of Arnee, to the right of occupancy of which the Plaintiffs lay claim.

No. 62 of 1847.

Decree dated 28th Sept. 1850. *Page* 74 *M. V.*

1. This suit was originally brought by the Plaintiffs (Special Respondents,) for the recovery from the Defendants of Fanams 108 on ac-

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count of Patom, and Fanams 1,418 the value of Gold ornaments, and Brass Utensils, &c., and possession of fields and Parambas yielding annually Fanams 515½, a house valued at 150 Fanams, and 7 slaves valued at 350 Fanams.

2. The Plaintiffs claimed the said property, as being the next heirs of their relation "Manoo Putter" who died issueless in $\frac{983}{1807\text{-}8}$, leaving a widow "Soopoo Ammiar," who inherited the same from him and died in $\frac{1016}{1840\text{-}41}$ the members of the family to which he belonged (Bramins) having divided their property many years ago on the ground that according to Hindoo Law, the said property should revert to them, the said widow having had only a life interest therein.

3. The Defendants who admitted the relationship as stated in the Plaint, contended that "Soopoo Ammiar," having, as Manoo Putter's widow, lawfully inherited his property, had a right to the absolute disposal of it, and had accordingly, just before her death, made a division thereof, assigning in gift certain of the lands &c., to the 13th Defendant, grandson of her niece the 1st Defendant, for the expenses of his marriage, other lands to Pagodas for charitable purposes, and other lands, Brass Utensils, &c. to her nieces, the 1st and 2nd Defendants, &c. &c.

4. The Plaintiffs filed an agreement (Document No. 1) alleged to have been executed to them by the widow in $\frac{998}{1823}$, promising not to make away with the property, which was to revert to them on her death.

5. The Defendants produced several Documents, being a Will and Deeds of gift, disposing of the property as above mentioned.

6. Both parties denied the genuineness of the Documents filed by their opponents.

7. The District Moonsiff who tried the Original Suit decided generally in favor of the Plaintiffs on the ground urged by the latter in support of their claim; he moreover, declared that Defendants' Documents were not satisfactorily proved, and did not appear to be genuine; but that Plaintiffs' Document No. 1 was fully proved. He however, stated that fresh Suits must be brought for some of the mortgaged property.

8. Two appeals were preferred against the above decision, one by the 13th and 14th Defendants, and the other by the 1st Defendant and the 32nd Defendant, heir of the 2nd Defendant, deceased.

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9. The Subordinate Judge in appeal was of opinion that the Moonsiff's decision was substantially correct, but that he had weakened Plaintiff's cause by attempting to shew that his Document (No. 1) was valid, whilst Defendants' Documents were forgeries; neither of which deductions appeared to him (Subordinate Judge) to be supported by the proceedings; that however the main point to determine, was, whether or not, according to Hindoo Law, the widow of a member of a divided family could bequeath the property inherited from her husband to others than his heirs; that the Moonsiff's opinion on this point was supported by MacNaughton on Hindoo Law, as laid down by the Bengal Pundits, and acknowledged by the Court of Sudder Dewany Udalut in Calcutta in certain Decrees quoted in that work; that Colebrooke on Hindoo Law was to the same effect; and that the Pundit of the Court of Sudder Udalut, to whom he had referred the question, had replied that according to the Hindu Law Books, Smrootichendrika, &c., a widow belonging to a divided family cannot give or will away her late husband's estate for other than religious purposes; and he further defines these purposes to be gifts made by a widow in favor of good Bramins on the occasion of her husband's Sradhas, and other rites prescribed by the sacred code, or on the holy occasion of the Sun's or Moon's Eclipse; or in holy places in view to her husband's attainment of celestial bliss; but that gifts for the express purpose of defraying the expenses of the marriage of her own relations cannot be considered valid.

10. He therefore confirmed the Moonsiff's Decree, and dismissed the appeals, but *without* costs, on account of the misconduct of the Plaintiffs.

11. The 13th and 14th Defendants presented a Special Appeal against the above Decree, contending that the widow of a divided Bramin, who died childless, is not only entitled to inherit the whole of his property, but has a right to dispose of it in whatever way she pleases; that such was the answer given by the Pundit Sudder Ameen of the Civil Court, to whom the Subordinate Judge referred the question, although the appeal Decree makes no allusion to it; and that several Suits (which they quote) were decided by the late Zillah Court and the Civil Court in accordance with the same opinion, especially as regards gifts for marraige and other charitable purposes. They further submitted that, as the above opinion, and that stated in the appeal Decree to have been given by the Pundit

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of the Sudder Udalut, are contradictory, the question should be once more put to the latter, particularly as the customs and usages which prevail among the Malayalim Bramins differ from those observed by other Bramins, and the Law which holds good in Bengal does not apply to the country in which they (Special Appellants) reside.

12. The Court of Sudder Udalut found on referring to Sir Thomas Strange's work on Hindu Law (Vol. I. p. 248) that "although according to most texts, a widow has no absolute authority over immoveable property inherited from her husband, and cannot dispose of it without the consent of the next heirs, i. e. of her husband, yet according to 'Mitacshara', (the text quoted by the Special Appellants) said to be paramount in the territories of the Madras Government, such property is transmissible to her own heirs, being classed as part of her 'Streedhanam' or Marriage portion." They therefore admitted a Special Appeal with the view to ascertain by a further reference to their Law Officers what the Law on the subject really is.

13. The following questions were accordingly put to the Pundit of the Court of Sudder Udalut, and the following answers obtained :—

Has the widow of a member of a divided Hindu family the power to assign or transfer in gift, or to bequeath by Will, the immoveable property inherited from her husband to her *own heirs*, to the prejudice of those of her husband?

ANSWER.

The widow referred to in the question cannot give away the real property as stated in it, it being incompetent for her, according to the Hindu Law Book "Vijnanaswareyen," &c., to dispose of the said property at her pleasure.

QUESTIONS.

Referring to the former question, does the same Law apply with regard to personal or moveable property, such as Gold and Silver Ornaments, Brass Utensils, &c., or has the widow power to dispose of it at her pleasure, or for any particular purpose?

And does the same Law apply equally to Hindu families in all parts of India or not?

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Answer.

The Law expounded in our answer of the 26th Ultimo, does not apply to personal or moveable property; as from the Law Book "Vijnanasware-yen" and the Books entitled "Madhaveyen," "Saraswateveelassem," &c. (which are consistent with the first mentioned authority), it is conclusive that a widow has power to consume at her pleasure, not the immoveable property, but the moveable property inherited by her from her husband.

2. The widow has power to dispose of her husband's personal property inherited by her, at her pleasure.

3. The Law expounded in para 1 applies only to the five kinds of Drâvedâs who adhere to the aforesaid legal authorities, and to the other classes who are guided by them in their several practices, but not to Gowdas, who act according to the Law Book "Jimata Váhána," or to the other classes, whose practices are regulated by them.

14. On referring to the answers given by the Pundit of this Court to the questions put to him by the Subordinate Judge it appears that he therein further declared that the gift by a widow for religious purposes of a portion of the land inherited from her husband, provided that portion be but small, would be valid, although disapproved of by her husband's Cousins.

15. The above opinions are somewhat conflicting, but it appears to be generally established that the widow of a divided Hindu family has no power to alienate the immoveable property inherited by her from her husband, except perhaps a small portion thereof, for religious purposes alone, as defined in the answer of the Pundit, but that she has absolute authority over the personal or moveable property inherited by her from her husband, to consume or dispose of it at her pleasure.

16. Under these circumstances the Court of Sudder Udalut resolve to confirm the Decrees of the Lower Courts with the exception of that part in which the 1st and 32d Defendants are adjudged to give up to the Plaintiffs certain Utensils (in No. 18) or the price thereof Rupees 20, which they reverse, costs on which amount are to be paid by the Plaintiffs. The Special Appellants to bear all costs in the Special Appeal Suit.

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No. 39 of 1850.

Decree dated 31st October 1850. *Page* 93 *M. V.*

1. The Original Suit was instituted by the Special Appellants to establish their right to the office of Dharmakarta of the Pagoda of Vencatasaperoomal in the Village of Teeroomacoodul with the emoluments thereto pertaining, estimated at the annual sum of Rupees 228-14-0.

2. It was alleged in the Plaint that the office in question had been held in hereditary succession by 1st Plaintiff's ancestors, and that 2nd Plaintiff's ancestors had been the Gomastahs of the former; that the office was so held up to the year 1836, in which 2nd Plaintiff's brother having suddenly died and 2d Plaintiff being at that time up-country, and 1st Plaintiff being resident at Sholangur, the defendants were enabled to league together and usurp the office, putting the 5th Defendant in charge, and the 6th Defendant as his Gomastah. That some time after Plaintiffs having returned to the Village claimed the restoration of the office, when their right to it was recognized by the Defendants, who promised to give possession but subsequently failed to do so. It was further alleged by Plaintiffs that in the year 1846, they from their own means provided all the necessary expenses for the Pagoda, and they claimed therefore, to recover Rupees 228-14-0 as that year's income.

3. The Defendants in their answer denied the truth of Plaint *in toto*. They contended that they, with the exception of the 3d Defendant, were, as the Meerasseedars of the Village, solely entitled to the management of their Pagoda, and had held it from time immemorial; that the right of appointing Dharmakartas to the Pagoda was vested in them, and that they had exercised that right in favor of many individuals, 2d Plaintiff's father "Ragavacharry," and his elder brother "Teeroovengadacharry," having been among that number. They admitted that 1st Plaintiff's father was hereditary 1st Teertum of the Pagoda, and that 2nd Plaintiff's family had been employed as his Gomastahs in that office, but they denied that he had any right to the office of Dharmakarta or to appoint Gomastahs to it.

4. The Principal Sudder Ameen gave judgment in favor of the Defendants, as he considered that according to the Plaintiffs' own showing, it was manifest that they, the Defendants, had exercised the right of no-

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minating Dharmakartas to the Pagoda for the last 13 years, and that, consequently the action was barred by the Statute of Limitation.

5. The Principal Sudder Ameen was moreover of opinion that no proof whatever had been adduced to show that 1st Plaintiff's family had lineally held the office in question,—but on the contrary it was expressly stated, in a Takeed issued by the Collector of the District, under date the 23d December 1824, on an application made by Doddacharryar for permission to appoint Ragavacharryar's son to succeed that individual as his Gomastah for the office of Dharmakarta, that those individuals had nothing to do with the office of Dharmakarta.

6. The Plaintiffs dissatisfied with the Decree of the Principal Sudder Ameen appealed to the Civil Judge, contending generally that the appreciation of the evidence oral and documentary by the Principal Sudder Ameen was incorrect, and arguing that as Teeroovengadacharry must be held to have succeeded his father Ragavacharryar as Doddacharryar's Gomastah, the possession by 1st Plaintiff's family must therefore be held to extend to 1836; thus excluding the operation of the Law of Limitation as a bar to their Suit.

7. The Civil Judge concurred with the Principal Sudder Ameen in deeming the Plaintiffs (Appellants) to have failed in establishing their plea that the office of Dharmakarta to the Pagoda in question was their hereditary right, and being also of opinion that their allegation, that they had provided the usual daily expenses of the Pagoda in the year 1846, was wholly untrue, the Civil Judge confirmed the decision of the Principal Sudder Ameen, and dismissed the Appeal with all costs.

8. From the foregoing Decree of the Civil Judge, the Appellants presented an application for the admission of a Special Appeal, urging in support thereof amongst other grounds—that the Decree of the Principal Sudder Ameen admitting the right of the Special Appellants to the office of Dharmakarta, but repudiating their claim to it on the plea that the action was barred by the Statute of Limitation, is erroneous, inasmuch as the brother of the 2d (Special Appellant) held the office as the Gomastah of the 1st up to the year 1836, as appears by the Tahsildar's Letter marked J. now on the file of the Sudder Udalut; that the Civil Judge's remark, that there was no sufficient evidence to show satisfactorily that the first Special Appellant's ancestor held the disputed office previous to 1817, is also

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erroneous, inasmuch as the Principal Sudder Ameen admits in his Decree that the Ancestors of the 1st Special Appellant held it by lineal succession from 1787 to 1824; which fact is further corroborated by the inscription engraved on the altar of the Pagoda, as well as by sundry public documents and the evidence filed in this Appeal.

9. The Court of Sudder Udalut admitted a Special Appeal on the ground that the Civil Judge had omitted to take evidence in respect to the allegation set forth by the Appellants in their detailed Petition of Appeal, to the effect that the altar of the Pagoda in question bears an inscription setting forth the hereditary right of the 1st Appellant's family to the disputed office—and that the Decree of the Principal Sudder Ameen deciding that the action was barred by the Statute of Limitation is founded on error.

Para 10. From a perusal of the Decrees of the Lower Courts the Court of Sudder Udalut consider it to be established beyond doubt that previous to the Pagoda having fallen under the management of the Collector, the ancestors of the Special Appellant were recognized as its Dharmakartas, and although it appears, that during that officer's management of the institution various parties were from time to time entrusted by him with the duties appertaining to the disputed office, and thus continued up to the year 1836, when the usurpation by the Defendant is alleged to have taken place, the Court of Sudder Udalut are of opinion that the acts done by the Collector during the period of his management or control cannot be viewed as negativing any hereditary right which the Special Appellants may be proved to possess, or as precluding them from seeking by a Civil action to establish those rights, which are now withheld from them by the Defendant, irrespective of the Collector who has ceased to interfere directly in the affairs of the Pagoda. Under this view of the case, the Court are of opinion that the right of action must be calculated from the year 1836, and not from 1824, as assumed by the Lower Courts.

No. 44 of 1848.

Decree dated 18th November 1850. *Page* 103 *M. V.*

1. The Original Suit was instituted by the Plaintiff "Veerabuddra Chitty" for the recovery from the Defendants of a loan of Rupees 125, with interest due thereon Rupees 105—total Rupees 230.

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5. The District Moonsiff awarded to the Plaintiff the sum sued for to be paid by both the Defendants with costs.

6. The Defendants appealed, alleging that the delay in the payment was owing to the Plaintiff's own fault, who had allowed the debt to run on in order to gain additional Interest—and that 1st Defendant was prepared long ago to pay the amount of the Bond, if demand had been duly made—and that at all events 1st Defendant only is liable.

7. The Subordinate Judge in his first Decree, observed that it was evidently the intention of the Bond that the debt should be paid in a few months,—and as it did not appear that the Plaintiff had pressed for payment till a short time before the institution of the Suit, although the parties live near to one another, there was reason to believe that 1st Defendant's statement as to the avaricious motives of the Plaintiff was well founded.

8. He therefore modified the Decree of the District Moonsiff, and adjudged the 1st Defendant alone to pay to Plaintiff the sum of Rupees 140 (being the Principal with one year's Interest) with costs upon that amount both in Original and Appeal—exonerating the 2d Defendant from all liability.

9. A Special Appeal was presented to the Court of Sudder Udalut by the Plaintiff objecting to the above Decree, on the ground that the Subordinate Judge had failed to examine the witnesses whom, he had declared, he was ready to produce to prove that he had made several demands for payment of the loan.

10. On this ground, and, because, even admitting that no demand was made, the disallowance of the legal interest stipulated in the Document, was clearly contrary to judicial precedent, the Court of Sudder Udalut admitted a Special Appeal, and remanded the Suit to the Lower Court in order that the said witnesses might be examined, and a fresh judgment passed.

11. In his revised Decree, the Subordinate Judge observed that having reconsidered the case, together with the evidence since adduced by the heirs of the Respondent (who had died in the interim), he was still of opinion that the amount awarded by the District Moonsiff was excessive, and much more than he (Respondent) could justly be considered entitled considering the terms of the Bond—that even admitting him to have

acted in good faith, he was to blame in omitting either to press for payment, or obtain some written acknowledgment from the Appellants during the long period that elapsed from the execution of the Document in 1838 to the filing of the Suit in 1845—that only one of the witnesses stated that any demand was made until recently, and that was in 1842 or 1843—that, moreover, it was shewn by the evidence of one witness, who appeared to be on friendly terms with both parties, that an attempt at mediation was made about 2 months before the filing of the Suit, when he (witness) arranged that Appellant should pay Rupees 50 on account of Interest in addition to the Principal sum—to which however the Respondent would not agree.

12. The Subordinate Judge therefore adjudged to the heirs of Respondent the sum of Rupees 125, with Interest Rs. 50—total Rupees 175—to be paid by the Appellant (1st Defendant in Original Suit).—Costs of Suit in both actions to be defrayed by the respective parties, as the subsequent litigation had probably resulted from Respondent's refusal to accept the abovementioned composition.

14. A Special Appeal was admitted, as it appeared to the Court that the plea set up by the 1st Defendant (Special Respondent) against the payment of the full legal Interest stipulated for in the Bond, was preposterous and utterly inadmissible—and that, therefore, the Decree of the Subordinate Judge disallowing a portion of the Interest claimed and costs of Suit, was obviously erroneous and contrary to judicial practice and precedent.

16. The Court of Sudder Udalut being of opinion that the Special Appellants (heirs of the Original Plaintiff,) are fully entitled to be paid legal Interest, as stipulated for in the Bond (No. 8) executed by the 1st Defendant, resolve, in modification of the Subordinate Judge's Decree, to adjudge the 1st Special Respondent (1st Defendant in Original Suit) to pay to the Special Appellants the sum sued for, together with further Interest, at the same rate, up to the date of execution—with all costs of Suit.

No. 14 of 1849.

Decree dated 17th December 1850. *Page* 119 *M. V.*

1. In the Original Suit, the Special Appellants (Plaintiffs) sought to recover possession of certain lands cultivated by the Respondents (De-

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fendants) on Puttahs issued by the Sub Collector of the District, in the names of the 1st, 2d, 3d, 4th, and 5th, Respondents; and of Rupees 3-14-0 the balance of Sawmy Bhogum, or proprietor's rent, due on the said Malgoozary lands, on an agreement executed in the Special Appellants' favor.

2. The Pundit Sudder Ameen doubting the validity of that agreement, and considering that the fact of the Village being Adakerry, or divided, was not established, and consequently that the particular lands sued for did not belong specially to the Special Appellants, and moreover had, after having been left uncultivated for a long period, been given on Puttah by the Government Officers to the Respondents to cultivate, non-suited the Special Appellants with all costs.—From this decision an Appeal was preferred, but the Civil Judge confirmed the Original award, stating the grounds of his decision as follows. That although the Respondents had executed the Sawmy Bhogum agreement, their right to occupy the lands was not affected thereby, as they had been compelled to execute that agreement, or give up the land, on the cultivation of which they had spent so much time and capital. That the lands of the Village are Sirkar, as distinguished from those the Government have alienated, and that the Sirkar lands have been from time immemorial the absolute property of Government, and were disposable of at their pleasure; and that any right or interest of private individuals therein must originate with Government, from whom only it could be derived. It was therefore for the Appellants to shew that they possessed such rights, and so derived, as would debar the Officers of Government from making such arrangements as might be necessary for the realization of the land Revenue. Having thus asserted certain data under which he denies all Meerassee rights in lands, the Civil Judge proceeds to lay down that it was competent for the Officers of Government to grant the Puttahs of which the Special Appellants complain, and to authorize the occupation of the lands by the Respondents, they having been allowed to remain waste for a lengthened period, during which the Petitioners had altogether omitted to exercise the exclusive interests now claimed therein by them, and therefore the Civil Judge confirmed the award, of the Pundit Sudder Ameen.

3. Against this award a petition for the admission of a Special Appeal

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having been presented, was, on consideration, complied with on the grounds that the Decrees of the Lower Courts in this matter, which set aside the rights of the Special Appellants to lands which appear to have been held by them upon Meerassee tenure, and in the face of an agreement executed by the Respondents, in which the Petitioners, were acknowledged to be the Meerasseedars of the lands sued for, are opposed to Law and usage.

6. The Court of Sudder Udalut are of opinion that it is established that the Village of Echoor, in which the disputed lands are situated, is an Agraharum, the lands of which have been for many years divided amongst the shareholders ; and that the lands in dispute formed a portion of those which fell to the ancestors of the Special Appellants. The Court also consider the Swamy Bhogum document to be a genuine one, executed by the 1st Respondent.

7. The Court of Sudder Udalut are also further of opinion that the law as laid down by the Civil Judge, relative to the Government Officers having authority unreservedly to dispose of any lands situated in a Meerassee Village that may be left waste for a period of years, is erroneous, no such right being claimed by the Government by whom the prescriptive rights and privileges of the Meerasseedars are upheld. On these grounds the Court of Sudder Udalut reverse the Decrees of the Lower Courts, and award that the Special Appellants do recover, under their Swamy Bhogum deed, possession of the lands sued for, and the sum of Rupees 3-14-0 claimed. The Special Respondents to pay all costs incurred.

No. 27 of 1850.

Decree dated 23rd December 1850. *Page* 124 *M. V.*

1. The Original Suit was instituted for the recovery from the Defendants, four in number, of the sum of Rupees 1,000-5-9—the amount of principal and interest alleged to be still due on two Bonds executed in the Plaintiff's favor by the 1st Defendant, for the sum of Rupees 325, and Rupees 500 respectively, the purchase money of two wheeled conveyances.

2. The 2nd, 3rd and 4th Defendants were included in the Suit, the former as the undivided brother, and the two latter as the undivided Cousins of the 1st Defendant.

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3. The 3rd Defendant alone defended the Suit; the 1st, 2nd, and 4th Defendants having allowed the case to be tried exparte.

4. In his answer the 3rd Defendant denied all knowledge of the transaction, upon which the Suit was founded, and urged that the family was a divided one.

5. The Subordinate Judge considering the execution of the bonds upon which the Suit was founded, to have been clearly proved, and being of opinion that the 3rd Defendant had failed to establish the alleged division of the family, awarded to the Plaintiff the sum sued for, with interest up to the date of the Decree, adjudging the four Defendants to be equally answerable for the amount, as members of an undivided family.

6. The 3rd Defendant appealed, but the Civil Judge concurring with the Subordinate Judge in his appreciation of the evidence adduced, and in his view of the Law of the case, confirmed the Original Decree.

7. A Special Appeal was, on the application of the 3rd Defendant and Appellant, admitted by the Court of Sudder Udalut on the ground that it was opposed to the principles of the Hindoo Law, and was repugnant to justice, that all the members of an undivided family should be held responsible for every debt incurred by any one member of it, without reference to the nature of the transaction, or whether the debt was incurred for the private purposes of the individual by whom it was contracted, or for the united interests of all the members of the family.

9. The Court of Sudder Udalut submitted the following question for the opinion of their Law officers.

"A member of an undivided family buys certain articles for his sole and private use and gratification, and executes, without the knowledge of his coparceners, bonds promising to pay the value of the articles. Are his brother and paternal cousins jointly answerable for the payment of the bonds?"

10 To which question the Pundits gave the following reply.

"The brother and other coparceners of the debtor referred to in the question, are not jointly answerable with him for the payment of the debts he had contracted for his own use, and not for the benefit of the family."

11. In accordance therefore with the above exposition of Hindoo Law, the Court of Sudder Udalut resolve to remand the Suit for further in-

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vestigation, as the record fails to show that the debt incurred was for the benefit of the family, of which in the opinion of the Lower Courts, the original 1st Defendant is an undivided member.

1851.

No. 5 of 1851.

Decree dated 30th January 1851. *Page* 3 *M. V.*

1. This Suit was instituted to establish the right of the Plaintiff and his minor brothers to receive from the Mootahdar of Taudamputty Pottahs for 3 lots of land and a Tamarind Tree, all valued at 60 Rupees, and to account to the Mootahdar for the rent of the same from the year 1843-4 or Rupees 56-5-7.

2. The Plaintiff alleged that the Defendant, his paternal uncle, by formal deed of gift on the 5th October 1840 gave the said land and other property to himself and his brothers. He urged that, as the Defendant had no male issue, and as possession was immediately given, the gift could not be revoked, and he explained that the Defendant, in whose name the Puttah continued to be issued, had induced the Mootahdar to refuse to receive the rent for the year in question from him (Plaintiff) and to file a Suit against the Defendant for the arrears.

3. The Defendant admitted the execution of the deed of gift, but alleged that he executed it when about to proceed on pilgrimage to Ramásserum, in order that his creditors might be paid, and his property duly preserved.

4. The District Moonsiff having passed Judgment in the Plaintiff's favor, the Suit was remanded by the Civil Judge in order that further evidence might be received on the part of the Defendant, who then urged that a son had been recently born to him, and that consequently the deed of gift could no longer be of any force or effect.

5. The District Moonsiff in his revised Decree awarded to the Plaintiff all that he had claimed, and this Decree was confirmed in Appeal by the Subordinate Judge.

6. Upon this the Defendant presented an application for the admission of a Special Appeal, urging that the property specified in the deed of gift had never been out of his own possession—that by the subsequent

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birth of 2 sons the gift had been nullified—that if the gift were held good his creditors would be defrauded, and that the property had been undervalued in the Plaint.

7. This application was rejected by the Court of Sudder Udalut.

8. On the presentation of a Petition for a review of the order rejecting the above application, the Court of Sudder Udalut submitted for the opinion of the Hindoo Law Officers the question "whether the birth of sons *after* the execution of the Bond (No 10) giving the property of the Defendant to the Plaintiff rendered the gift invalid or not," and their reply was to the effect, that "the Defendant had not the power to dispose of all his property so long as he was able to beget children, but that he might alienate a small portion of the same, if by so doing he did not deprive his issue then born, or that might be born to him, of the means of support."

9. With reference to this exposition of the Law the Court of Sudder Udalut admitted a Special Appeal, on the ground that the Decrees of the lower Courts were defective, and that the opinion of the Law Officers as to the validity of the gift had not been obtained.

10. The Court of Sudder Udalut observe that the Decrees of the lower Courts are not sufficiently clear and specific as to the point, whether the whole or a portion only, of the property of the Defendant was included in the Document No. 10, to enable the Court to dispose of the question involved in this Suit.

11. The Court of Sudder Udalut also remark that the course laid down by Section XVII, Regulation III of 1802, which ought never to be omitted, was not followed either by the District Moonsiff or the Acting Subordinate Judge.

12. The Court of Sudder Udalut therefore resolve to remand the Suit back to the District Moonsiff for disposal, with reference to the above observations.

No. 11 of 1851.

Decree dated 3d March 1851. *Page 7 M. V.*

11. The Court of Sudder Udalut deem it also necessary to direct that in future the Assistant Judge will abstain from disposing of two

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Appeals, not strictly cross Appeals, in one Decree. This course has led to much confusion in this case, and is calculated to complicate the question at issue and mislead the superior Court.

12. The Court further observe that, when the merits of more than one Deed come to be discussed in a Decree, it is desirable that such Deed should be distinguished by a number or letter, and referred to accordingly. In the Suit under consideration there are two Deeds of Sale and one Mortgage Deed, and these are so mixed up in the Assistant Judge's decision that it is difficult to distinguish one from the other.

No. 43 of 1850.

Decree dated 31st March 1851. *Page* 32 *M. V.*

1. This Suit was laid for the recovery of 252 Rupees, the market value of 14 Candies of Paddy, due under a Bond executed by the 1st Defendant on the 30th June 1836.

2. It was admitted that the Bond sued on, which was for 200 Rupees and which stipulated that repayment should be made by 10 annual instalments of 2 Candies of Paddy, had been executed and the points at issue consequently were—

Whether it had been liquidated in full, as stated by the 1st Defendant, or in part only, as asserted by the Plaintiff.

And whether the 3d Defendant, the wife of the 1st Defendant, and his son, the 2d Defendant, who was stated to have been adopted by his maternal grandfather, were, equally with the 1st Defendant, liable.

3. The Moofty Sudder Ameen held that a part only of the original debt had been liquidated, and that the 2d and 3d Defendants, though living apart from the 1st Defendant, had, by promising to satisfy the demand, and by frequent intercourse with the 1st Defendant, made them selves liable to the claim.

4. He discredited the plea of adoption advanced by the 3d Defendant and consequently decreed that the Defendants should satisfy the Plainttff's claim in full.

5. The Civil Judge in appeal took the same view of the plea of adoption as the Moofty, but modified the Original Decree by adjudging

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payment of ⅔rds of the sum originally lent, or Rupees 123-5-4 and subsequent interest, on the ground that it was admitted that ⅓rd of the Paddy stipulated in the Bond, viz., 20 Candies, had been delivered.

6. Upon the application of the 2d and 3d Defendants the Court of Sudder Udalut admitted a Special Appeal to ascertain, by a reference to the Law Officers of the Court, if the awards of the Lower Courts, as they affected the 2d and 3d Defendants, were in accordance with Hindoo Law or not.

8. The Court of Sudder Udalut referred the following question to their Law Officers.

" A, the Husband of B and the Father of C executes a Bond, B and C are living away from A with B's parents; no deed of separation or division of property has taken place, are B and C liable to be called upon, jointly with A, to pay the debt contracted by A, A being at the time alive?"

ANSWER.

" The Hindoo Law books "Vijnanaswareyum" &c. do not declare that the debt contracted by a person shall be discharged by his wife and son, while the said person is alive, is residing in his own village and is still capable of carrying on business."

" Consequently the wife and son of A referred to in the question are not liable to pay jointly with A the debt contracted by him, whilst he is alive."

9. As it is shown from the above answer that the Lower Courts, in finding the 2d and 3d Defendants liable with the 1st Defendant for the debt contracted by him, have mistaken the Law of the case, the Court of Sudder Udalut do hereby amend the said Decrees and declare the 1st Defendant alone answerable for the sum awarded.

11. The Court of Sudder Udalut also desire to point out to the Lower Courts that it is necessary in all cases involving questions of Hindoo or Mahomedan Law to adhere strictly to the provisions of Section XVII Regulation III of 1802.

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No. 15 of 1851.

Decree dated 3rd April 1851. *Page* 36 *M. V.*

8. The Court of Sudder Udalut remark in the first instance, that the Defendant in the Original Suit, who was served with a notice, died, it is alleged by the Appellant, before the District Moonsiff passed his Decree, and, if that allegation be true, it is obvious that the Moonsiff's decision was irregular, as no supplemental Plaint was received from the Plaintiff, and no notice isssued to the deceased Defendant's heirs to defend the Suit.

No. 61 of 1849.

Decree dated 14th April 1851. *Page* 48 *M. V.*

1. The Special Respondent brought this Suit in the first instance against Special Appellant's father (4th Defendant) and four others for one Pungoo of land, and five years produce commencing from the year Vicary 1839-40.

2. It appears that in the year 1835-36, Munmadah, the 1st Defendant, sold, as is asserted conditionally, to the 2d Defendant 1½ Pungoo for 132 Rupees, the alleged conditions being, that he (1st Defendant) was to get back his land after five years on payment of the principal; that to this effect an agreement was to be executed, for which purpose a stamp Cadjan was purchased; but no such agreement was ever executed.

3. At the expiration of the five years the 1st Defendant sold to Plaintiff one Pungoo and mortgaged to him the other half Pungoo; but the 2nd Defendant refused to resign the land until recourse was had to the Revenue authorities, when the parties came to an amicable arrangement, the 2d Defendant receiving 140 Rupees from the 1st Defendant and giving up all claim to the land, which was confirmed by the execution of Razeenamah before the Tahsildar. No sooner, however, did the Plaintiff

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proceed to take possession of his purchase, than the 4th Defendant appeared to oppose him, on the ground that he had sometime before purchased the land from the 2d Defendant for 190 Rupees, and the subject was again brought before the Revenue authorities, on which occasion the 2d Defendant deposed that the sale to the 4th Defendant was fictitious, and that he had not received the purchase money.

4. The 1st Defendant admitted the Plaint, asserting that his land was only sold conditionally to the 2d Defendant, and, to shew that the sale for 132 Rupees could not have been absolute, he instances that the same quantity of land in the same Village had been purchased for 250 Rupees.

5. The 4th Defendant (Special Appellant's father) contended that the Bill of Sale given by the 1st Defendant to the 2d Defendant was an absolute Bill of Sale, and that on this understanding he subsequently became the purchaser, and in proof of his position he shows that, while these lands were in possession of the 2d Defendant, they were attached in satisfaction of a Decree in favor of this Plaintiff against the 1st Defendant, and were released on proof of their having been sold to the 2d Defendant, and in further proof of his assertion he cites a deposition given by the 2d Defendant in which he denied ever having made any promise to the 1st Defendant to surrender the lands.

6. The 2d Defendant agrees with the 4th Defendant, and states in his answer that in Viasee of Sarvary 1840, he executed to the 4th Defendant an agreement which was attested by the 1st Defendant, to the effect that the Meeras should be registered in the 4th Defendant's name.

7. The Lower Courts were of opinion that the Bill of Sale executed by the 1st Defendant to the 2d Defendant must be received as a conditional one, and, consequently, that it was open to the 1st Defendant to redeem the lands within five years, and that the previous sale of them to the 4th Defendant by the 2d Defendant could not be allowed. The lands were therefore adjudged to the Plaintiff whose Bill of Sale was proved.

8. The Civil Judge in his Decree observes, that the "record exhibits a lamentable want of good faith on the part of the 1st and 2nd Defendants, who, it is evident, have from the commencement been striving to over-

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reach each other and the Plaintiff, in which endeavour the 2nd Defendant has been assisted by his relation the 4th Defendant."

9. As to the non-execution of the agreement, for which, it is shewn, a stamp Cadjan had been purchased, the Civil Judge remarks, that, "it is true that mere intention cannot as a general rule be admitted as proof, more particularly when made in aid of a fraudulent motive, and, were it not that the Court's rejection of the conditional agreement on the part of the 2nd Defendant would legalize the sale to the Appellant to their benefit and to the serious injury of the Respondent, the Court would be disposed to require more full and decided proof."

10. A Special Appeal was admitted, as it appeared to the Court of Sudder Udalut that the Lower Courts, in rejecting a document admitted by all parties to the Suit on the ground that it had been shewn to bear a meaning different from the terms in which it was engrossed, had gone contrary to the usual judicial precedents in such cases.

12. The Court of Sudder Udalut on a careful consideration of the proceedings held in this case are of opinion that the Decrees of the Lower Courts must be reversed.

13. The Court of Sudder Udalut are not prepared to declare that the conclusions arrived at by the Lower Courts are incorrect; but they are clearly of opinion, that, when a document has once been admitted before a Court by the party executing it, it is not safe or fitting for the Court on a future occasion to accept from the same party a plea urged in objection to the aforesaid document, and which plea, if true, could only have been withheld from the Court on the previous occasion to enable the party to effect a fraudulent purpose.

14. In the present case, as shewn above, the land in dispute was released from attachment on the ground that the Bill of Sale executed by the 1st to the 2nd Defendant was unconditional. Of this fact, which was not questioned at the time by the 1st Defendant, the Plaintiff (Special Respondent) must have been cognizant when he purchased the land from the 1st Defendant, inasmuch as the attachment was made at his instance, and under these circumstances the Court of Sudder Udalut consider that neither the 1st Defendant nor the Plaintiff can now look to the Courts for redress.

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No. 50 of 1850.

Decree dated 17th April 1851. *Page* 59 *M. V.*

12. It is obvious that in the management of charitable institutions, the heirs of the founders can have no legal right to interfere, unless under some special powers given to them by the founders; and in the present case, a perusal of the record satisfies the Court that the Special Appellants are deficient in this title.

No. 45 of 1850.

Decree dated 3d July 1851. *Page* 72 *M. V.*

1. The merits of the case, as set forth in the Agent's decision, are, that the Respondent was upwards of 20 years in the Service of Appellant and of his Father; that he was much trusted by the latter, and nominated his Dewan in October 1813. The late Zemindar dying in 1845, the Respondent officiated in a like capacity in the household of his son, present Appellant. On the 25th May 1818 Respondent retired from service, having obtained a written sunnud from Appellant, which conveyed to him a pension of 122 Rupees a month for life, with other perquisites. Upon the 8th August 1819 payment was stopped, the Appellant in a written order giving as the reason, that Respondent had grossly abused Appellant's confidence before retiring from Office in the matter of a creditor, or claimant, upon Appellant's father's estate, one Ambasenker; Respondent, denying any abuse of confidence, and repudiating the legal right of Appellant to recede from an engagement guaranteed by his seal and signature, has, therefore, brought this action to enforce payment of the pension.

5. To prove the Plaint three documents were filed. First. The sunnud by Appellant's father appointing Respondent his Dewan. Second, the Puttah conferring a pension for life; and third, the order announcing that payment would be discontinued. The sunnud on which the Suit is based is here set out *verbatim.*

" Puttah granted by Sree Viziaramrauze Maharauze to Cookoodala Narrainappah."

" As you have long acted with zeal and fidelity in the affairs of my " Circar, I, out of my favor, grant you a pension of Rupees 122 per " month, together with the fixed allowances heretofore annually disburs- " ed from my Circar, viz. Rupees 225 for cloth, Rupees 100 for the

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" Vausuntanavarathrum feast, and Rupees 100 for the Saradanavarathrum " feast. I shall pay these during your life. After your demise I shall " maintain your children, while they are well wishers to my Circar."

10. In respect to the imputed unfaithfulness of the Respondent, and the alleged fact, that the Respondent knowingly allowed the individual named Ambasenker to practice a fraud upon the Appellant, the Agent, after a very full consideration of all that had been urged by Appellant, observed " that the allegation of fraud, deceit, and misconduct against the Respondent falls to the ground," and declared a Verdict for Respondent for the amount claimed, with costs.

11. In the Appeal petition the same arguments are used as those urged in the original answer. The illegality of the demand, founded on the Deed of pension, is also contended for, as opposed to Hindoo law.

13. The Court of Sudder Udalut, having interrogated the Law Officers of the Court, as to whether, or not, the Deed sued on was under Hindoo law binding upon the Appellant, were answered in the affirmative.

14. The Deed being, therefore, valid according to law, the Court of Sudder Udalut confirm, with costs, the Decree of the lower Court.

No. 32 of 1851.

Decree dated 21st July 1851. *Page* 80 *M. V.*

1. The Suit was instituted for the recovery of Rupees 59-2-0 which, upon the 1st and 2nd Defendants engaging to be his securities, had been lent to the 3d Defendant by the Plaintiff, to enable him to pay his costs.

4. The Moofty Sudder Ameen, considering the claim of the Plaintiff to have been established by the evidence of his witnesses, passed a Decree in his favor.

5. This Decree was reversed, " as far as it affected the 2nd Defendant, or proceeded on the assumption that the Bond was true," by the Civil Judge, who considered the Suit a false one, and the security Bond, alleged to have been executed by the 1st and 2nd Defendants, a forgery. The Civil Judge further remarked, in his Decree, that, " besides all this, " the probability always is that the Suits and Bond of Plaintiff are " false, he has long been generally and publicly considered a forger and " suborner of perjury."

7. A Special Appeal was admitted on the ground that the Appeal

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Decree was defective, inasmuch as the Civil Judge had omitted to state in his judgment distinctly, whether the Decree of the lower Court, as it affected the 1st and 2nd Defendants, was reversed or affirmed.

8. And the Court of Sudder Udalut now resolve to remand the case to the Civil Judge, with directions to set forth in distinct terms the extent to which, in his opinion, the Decree of the Moofty Sudder Ameen is reversed.

10. The Court of Sudder Udalut also desire the Civil Judge to abstain in his future Decrees from stigmatizing, as he has done in this case, the parties who may seek redress in the Civil Courts.

11. If the record of the case justified the Civil Judge in his remarks that the Plaintiff was "a forger and suborner of perjury," it was manifestly his duty to have ordered him to be committed for trial before the Criminal Courts; but as the Civil Judge did not adopt this step, the Court of Sudder Udalut deem the remarks recorded by the Civil Judge unjustifiable and most improper.

No. 5 of 1850.

DECREE DATED 28TH JULY 1851. *Page* 87 *M. V.*

1. The case is thus stated in the Decree of the Civil Judge.

"This is an action to compel division of certain family property consisting of the Villages of Vulla Choorcha and Thacumputty, &c., and the allotment to each of the parties, entitled to distribution, of the shares according to law falling to them respectively."

"While the questions as to the liability of the property to division, and the shares, if it be, to which the members of the family are entitled were thus before the Civil Court; the 4th, 6th and 7th Defendants went into the Subordinate Court, and there commenced an action against all the other members of the family, for the shares to which they asserted themselves to be entitled, and which they alleged to be greater than the Pauper Plaintiffs allowed, inasmuch as while agreeing with them that the property in question is divisible, and ought to be divided, they deny that they (the said Pauper Plaintiffs) have any right to share in such division, owing to a division having taken place between their grandfathers; and adding a claim for one year's loss of produce on their said shares, as withheld from them by 1st, 2nd and 3rd Defendants."

"Upon this coming to the knowledge of the Court, the same was communicated to the Subordinate Court by proceedings under date 27th Dec. 1847, directing it to act in the matter as prescribed by Section IX, Reg. II. of 1802. The said Suit was accordingly struck off the file of the Subordinate Court, and the Civil Court has now to decide the question as to "liability to division" and if necessary *that*, as to the shares of the respective parties under Section XIX, Reg. II. of 1802."

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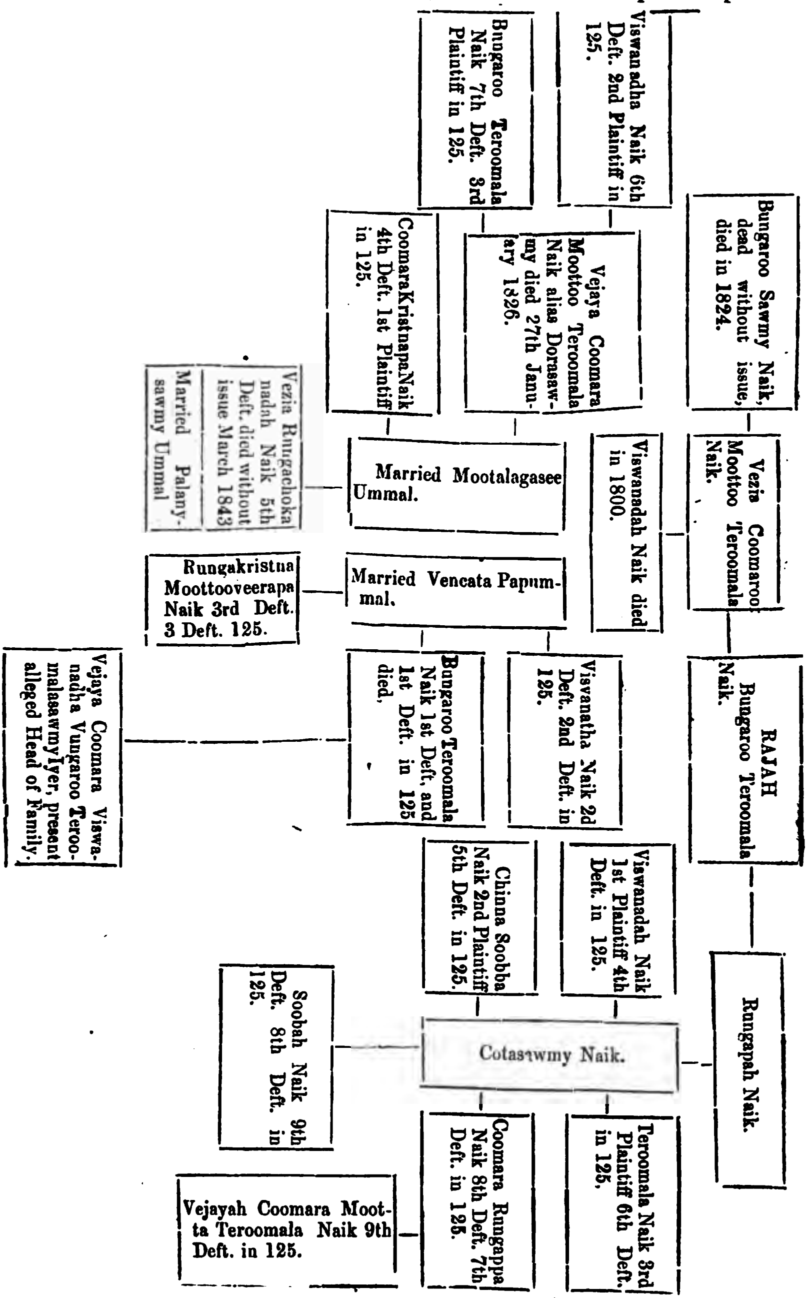
"The following genealogical sketch exhibits the relationship of the parties.



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" The Plaint sets forth the grant of the villages in question to Rajah Bungaroo " and avers that Plaintiffs, as three of the five sons of his grandson " Catasawmy, " are entitled in division to $\frac{3}{5}$ths of the half."

" 1st and 3rd Defendants assert the grant to have been made, not to " Rajah Bungaroo " but to his son " Vejaya Comara, " and that too, not as his son, but as the adopted son of " Meenatchy Ummal ; " and after the said adoption and 12 years after the death of the said Rajah Bungaroo ; and that his brother, " Rungapah Naik," through whom, as their grandfather, the Plaintiffs claim, had never any right or title to any part or share in the said Villages ; but on the contrary, sought and found support in other quarters, and independently ; and, moreover, that the estate being according to law and custom indivisible, descending through the heads of the family in order of primogeniture, is now held by 1st Defendant, and cannot be divided, he (1st Defendant) being only called upon to make due provision for the maintenance of the members of the family, which he has done, &c."

" 5th Defendant is dead without issue leaving a widow."

" The 4th, 6th and 7th Defendants, who appeared in the subordinate Court as Plaintiffs in 125 of 1844, assert the grant to have been made to " Bungaroo," who was succeeded by " Vijayah Comara, " who formally divided with his brother " Rungappah," who received 5,000 Rupees and gave up all claims ; they maintain the property to be divisible, deny the custom of hereditary succession according to primogeniture, in which case it would belong to 6th Defendant ; and contend that the property should be divided in equal shares between the descendants of Viswanadha by his 1st wife " Mootabayasa," and the 1st, 2nd and 3rd Defendants his issue by Vencatapaupummal the 2nd wife. They further allege that such division was actually made by the said Viswanadah, and though not carried into effect as to separate possession, was practically acted upon in the distribution of proceeds and profits. They have received allowances, &c, from 1st Defendant."

" 8th Defendant in his answer admits 1st Defendant to be head of the family, and that he is in receipt of allowances in land and money. The property has not been divided, it is however divisible, and he would wish it divided according to law."

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" The present Zemindar of Shevagungah, by motion No 456 of 1847, denies the absolute right of the family to the village, asserting it to be an Ayen Village. It was granted by former Zemindars for their maintenance, but may be resumed by him, which he desires to do."

" The Court having considered the above pleadings and evidence, was of opinion that the property in question was not liable to division, considering such exemption to be provided for in certain cases under the Hindoo law; and that the present case was one of such description, and therefore nonsuited Plaintiffs, and consequently declared the pretensions of the 4th, 6th and 7th Defendants, the Plaintiffs in 125 before the Subordinate Court, to share therein, to be alike untenable."

" Both these parties presented petitions for review of judgment Nos. 341 and 366 of 1848 with which, for the reasons recorded in its proceedings of the 15th September 1848, the Court complied, and obtained the sanction of the Sudder Udalut, bearing date 26th September 1848, to revise its Decree."

" The questions for decision, as above stated are 1st, is the property liable to division as contended for by the Plaintiffs, and 4th, 6th, 7th and 8th Defendants, or indivisible as pleaded by the 1st and 3rd; 2nd, if it be divisible, how should it be divided, who are entitled to share."

" The 1st and 3rd Defendants, who contend for the indivisibility, have, it must be observed, a double plea. The first, which by itself would go merely to exclude the branch of " Rungappah" is, " that the grant was not made to Bungaroo," and so, barring special cause of exemption, liable to division between his sons, but to his eldest son " Vejayah Coomara-Mootoo" after his alienation by adoption from the stock of his natural family. The second, which alone would exclude both the branch of Rungappah to which the Plaintiffs belong, and also the apparent coheirs of the admitted grantee, the 4th, 6th and 7th Defendants, Plaintiffs in No. 125 of 1814 before the Subordinate Court, and the other Defendants in this suit, " that to whomsoever the property was granted, whether to " Bungaroo" or " Vejaya Coomara" it is in its nature indivisible."

" The Court will proceed to determine on the second question in the first place, because if the property can be shewn to be exempt from division in any case, there will be no necessity for enquiring, whether such and such parties are entitled to share."

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"In recording its reasons for the conclusion to which it has come in this respect, the Court would first observe, that in favor of the supposition that the property is "of right indivisible and hereditary, descending from father to son in order" of primogeniture, burdened only with the obligation of maintaining the members of the family," is the indisputable fact that it has been so for a period beyond the memory of man, and has been so maintained and transmitted for upwards of a century, notwithstanding attempts made at intervals during that period, to disturb such order and succession. If Vejaya Coomara did not, as 1st and 3d Defendants say, receive the property under grant, then it must have descended to him as eldest son of "Bungaroo."

"To whom the grant was actually made is a matter involved in an obscurity and uncertainty, which there is no means of satisfactorily clearing up. The probability in the judgment of the Court, inclines to the supposition that it was made to the "Rajah Bungaroo," the documents Nos. 120 and 121, exhibited by the Plaintiffs, go to shew that the Village of Thecumputty was granted to "Bungaroo" and if it be held that such calamity as caused such grants to be made fell upon the family in his time, it is most probable that in the case both of Vela Coorchee and Thecumputty he was the original grantee. There is no proof whatever of the adoption by Meenatchy Ummal, which seems on many accounts improbable, and is indeed not material; if it shall appear, that there is an exemption from division in the nature of the grant, which would operate equally to prevent partition, whether it was made to Bungaroo the father, or to Vejaya Coomara the son, either as the son of his natural father or the adopted son of another."

"That the grant was of such a nature as to render the property conveyed by it, exempt from partition under the Hidoo law, the Court believes from the account given of it by both parties. The motives of the grantor are on all hands admitted to have been compassion for the unfortunate head of an illustrious and decayed family, and the estate to have been given for the maintenance of his rank and dignity; what the family understood by it they have themselves evidenced by their conduct since. From the period of the grant up to 1822 or 23, or for about 90 years, the head of the family enjoyed the estate, and maintained the younger members. About that time some disputes appear to have arisen,

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which were finally settled by the Collector's decision of 15th August 1825, (Defendant's document No. 1) which goes entirely in favor of the indivisibility and hereditary descent of the property. In this the family appear to have acquiesced, not adopting the alternative pointed out to them of a resort to the Civil Courts, if dissatisfied with it, until the commencement of these proceedings. What the Revenue authorities have thought upon the subject is also clear. In short, the custom, the former opinion of the family, and that of the public authorities, as to the intention and nature of the grant, are all shown to be in favor of the 1st and 3rd Defendants' case, by a mass of evidence, especially documentary, which seems in so far conclusive."

"But neither custom nor opinion, can supersede, or control the law: they may be, and are, evidence of the nature of the grant, and assist the Court in arriving at the conclusion that it "was bestowed upon an individual" as a mark of respect and out of regard to his rank and misfortunes, and for the maintenance and support of his "dignity," which seems fully and satisfactorily established in the present case; but it remains for the law to determine, whether property, so given, be exempt from the ordinary rules of division and distribution."

"That it is so exempt, seems to be a settled rule of law, and therefore the Court sees no necessity for making a reference to the Law Officers. Texts upon texts agree in maintaining that various contingencies may, and do exempt property from partition, and among them such a grant, as that now under consideration, is invariably enumerated."

"Thus: Wealth acquired by learning belongs exclusively to him who acquired it, and so does any thing given by a friend, received on account of marriage, or presented as a mark of respect. Menu, Chapter Nine, Section 206."

Whatever is acquired as a present from a friend, or gift at nuptials, does not appertain to co-heirs. Yajayawulaya, Chapter Two, Section 119. And Jimuta Vuhana in his Dayabhaga thus sums up the arguments on the subject. "By thus excepting (from partition) under these and other texts in regard to all the tribes, and all the classes of mixed or mediate origin, wealth acquired without the use of the joint stock, by the acquirer's own ability, whether effected by means of any science, or received from

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affectionate kindred, being given by a relative or *obtained* from a friend, or at nuptials, or as a token of respect, or gained by valour, or earned by labor, every acquisition made without the use of joint fund is excepted. Dyabhaga Chapter VI, Section I, para 36."

"The same doctrine of contingent exemption is insisted upon, and explained by the author of the Mitacshara in his commentary on the above quoted text of Yajayawalaya which forms the fourth Section of the first Chapter of his work, and again in Section VII, Chapter IV of the "Vyuvaham Myukha." "

"The 1st Defendant in his motion No. 473 has alleged other texts from Smrittichendriça, which the Court has not the means of verifying, but from what has already been adduced, is satisfied that under circumstances property may be exempted from division, and that the case under consideration is one in which such exemption is contemplated."

"Having adjudged the property to be indivisible, it is unnecessary to determine precisely, to whom it was originally granted, or whether, had it been held divisible, it would have had to be shared among all the members of the family, as exhibited in the genealogical table, or only among the descendants of Vejaya Coomara, as pleaded by the 4th, 6th and 7th Defendants, Plaintiffs in 125 of 1844. If those parties, or these Plaintiffs should choose to claim, as matter of right, any allowance, which they may have formerly received, and which may now be withheld, under circumstances which they may consider not to justify the same, there is nothing in this Decree to prevent their bringing their claim before a competent tribunal. But in respect of the claim for division, as made either by Plaintiffs or any of the Defendants in this suit, the Court pronounces against it, non-suiting Plaintiffs and ordering them, if at any time they should be able, to pay their own costs, and those of the 1st and 3rd Defendants."

2. Dissatisfied with this award the Plaintiffs appealed, stating that the villages in dispute are divisible, as the law of primogeniture only applies to "territories or dominions, regular Zemindaries and similar permanent possessions," in fact, that the Civil Judge himself, in stating that the said villages were given to their common ancestor for the benefit and maintenance of the family, allows the family title to participate in them,

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and, consequently, their liability under the Hindoo law to partition, should the members of the family at any time from any cause seek for such a partition as the law allows.

3. That the Civil Judge has, moreover, erred in stating that the opinion of the public authorities were all in Defendant's favor, as the contrary would have been fully established, had the Civil Judge not declined to admit on the record, documents produced by Appellant. The texts cited by the Civil Judge from the writers upon Hindoo law in no way apply to this case.

5. The Court of Sudder Udalut, in order that the Hindoo law, as applicable to the merits of this case might be ascertained, obtained the following opinions from the Law Officers of their Court.

QUESTION.

" A gave to B a certain Village for the benefit and maintenance of B and his family; B held and enjoyed it during his life time, and after his death his two sons C and D came into the possession of it; but C being the eldest, it continued in his management; C had two sons, one of whom died without issue, and D had one son; C's son, E, held the property after the death of C and D, D's son, F, being supported as a member of an undivided family, E had two sons, and F had five sons, E's two sons had three sons each, making six grand sons to E, three of whom are in possession now. Three sons of F, as also all the other coparceners, are desirous of a division of the said common property, as Sapindas. But the three grand sons of E, that are now in possession, object to such divisions as being opposed to Hindoo law; whilst F's sons demand a division, the property having been given for the family. You are required to state whether, according to Hindoo law, the property is divisible, or indivisible, the parties now litigating, being Sapindas of 3rd descent?"

" The Estate has been enjoyed for upwards of 125 years without division."

ANSWER.

" The question merely shews that the descendants of D, one of the two sons of B, continued to live as members of an undivided family, but not that they have forfeited their right to the Estate referred to; whilst

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it continued under the management of B's other son C, and, after him, of his son E, and of the latter's grand sons, as stated in the question. It is but consistent with the Hindoo law and local usage, that the descendants of the same common ancestor, should live undivided as long as they are on good terms, and effect a partition of their hereditary property when they are at variance with each other. In the present instance, the Village referred to, having been granted for the maintenance of B's family, belongs to all his descendants, and, as such, is divisible between the six grandsons of E and all the sons of F."

QUESTION.

"If the property referred to in the above question had been by the grantor conferred on the original ancestor of the family for the maintenance of the rank and dignity of his family, would it be exempt from the Hindoo law of partition"?

ANSWER.

"If the Village referred to had been conferred on the original ancestor, for the maintenance of the rank and dignity of his family, then, the said property, though common to all the members of the family, whose rank and dignity require to be maintained, would be exempt from partition; as, otherwise, it would be parcelled out into small portions, and each member in possession of a portion might attempt to dispose of it by sale, &c, an event which would gradually lead to the ruin of the Village, and to the loss of that family rank and dignity which require to be supported by it."

"But if the descendants of the original ancestor referred to be at variance with each other, and wish to live separately, they may divide the annual produce of the Village, and enjoy their shares respectively."

6. The second answer is in the opinion of the Court the one which correctly sets forth the law as applicable to this case.

7. The Court arrive at this conclusion, in the absence of the original grant, from the established usage, which it is found has prevailed as to the enjoyment of this property.

8. The decision of the Court, therefore, is, that the annual produce of the property in question be enjoyed by the respective claimants in such portions, as they may be found legally entitled to.

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No. 33 of 1851.

DECREE DATED 31ST JULY 1851. *Page* 103 *M. V.*

1. The Original Suit was laid for the recovery of Rs. 568-7-5 due on a Bond.

2 The Defendant in his answer denied the claim, but eventually filed a motion, in which he stated that the Plaintiff had compromised the matter, and given him a receipt in full of all demands, and prayed, consequently, that the suit might be dismissed.

3. The Mooftee Sudder Ameen dismissed the suit; but the record having been remanded and referred to the Principal Sudder Ameen, that Officer adjudged payment of the difference between the receipt and the sum claimed.

4. The Civil Judge in Appeal reversed the Principal Sudder Ameen's Decree, on the ground that the receipt filed by the Defendant was in full of all demands, and had been satisfactorily proved.

5. On the application of the Plaintiff, a Special Appeal was admitted, the Court of Sudder Udalut being of opinion, that the course adopted by the lower Courts in the disposal of the Suit was irregular.

6. The Sudder Udalut observe that the suit was brought for the recovery of a sum of money due on a Bond, and *after* the pleadings, in which the Defendant totally denied the execution of the instrument, were completed, and points recorded for proof, he moved the Court by petition to the effect that he had compromised the matter with the Plaintiff, and that the receipt then put in was an acknowledgment of the Plaintiff, and that he had fully satisfied all his demands.

7. The lower Courts when disposing of the Suit, instead of confining their consideration to the merits of the case as pleaded by the parties in their respective pleadings and to the evidence they might adduce in support of the same, went into the question as to the genuineness of the receipt, and without recording fresh points, or giving the Plaintiff the opportunity of refuting the same, decided that the receipt was genuine and that the Plaintiff must abide by it.

8. The whole of the above proceedings were irregular and contrary to practice. The Plaintiff was entitled to a decision in the case and the

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Pleadings filed and the evidence, oral and documentary, brought forward to prove the same. The alleged receipt, upon which the Lower Courts based their judgments, was irregularly received and filed after the pleadings were completed and points recorded, and, therefore, those tribunals ought not to have given their opinion on the validity, or otherwise, of the same. The receipt may, if the Defendant thinks fit, form the subject of a separate cause of action, but it cannot be taken into consideration in disposing of the case now before the Court.

No. 17 of 1850.

Decree dated 2d August 1851. *Page* 111 *M. V.*

1. The Original Suit was instituted for the recovery of Rs. 47-8-0, alleged to be due to the Plaintiff on account of arrears of maintenance, and for the payment of an allowance of Rs. 40 per annum.

2. The Sudder Ameen dismissed the Plaintiff's claim, but this decision was reversed by the Civil Judge, who considered that the Plaintiff had succeeded in establishing her claim to receive maintenance from the Defendant, the parties being widows of two undivided brothers, and the Defendant having received from the Civil Court a certificate granting her possession of the family property, on the ground that her husband had outlived the husband of the Plaintiff.

3. The Civil Judge accordingly awarded to the Plaintiff the sum of Rupees 12 per annum as maintenance, together with Rupees 12 on account of arrears due, leaving it optional to the Defendant, should she object to pay the maintenance awarded, to make over in its stead to the Plaintiff a moiety of the property taken possession of by her under the Certificate of the Civil Court.

4. On the application of the Defendant, a Special Appeal was admitted, on the ground that the proviso contained in the Appeal Decree for an equal division of the family property between the parties, in the event of the Defendant failing to pay to the Plaintiff the maintenance awarded, appeared to be opposed to the provisions of the Hindoo law; and that it was contrary to the practice of the Courts, that a Decree should declare an alternative to be at the option of either of the parties

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concerned, instead of pronouncing the positive opinion of the Court in regard to the matter under litigation.

6. The Court of Sudder Udalut, having taken into consideration the proceedings held in this case and the Special Appeal Petition, resolve to modify the Decree in Appeal, by adjudging the Special Appellant to pay to the Special Respondent Rupees 12 per annum for her maintenance, and 12 Rupees past maintenance, reversing that part of the said Decree which declared that an equal division of the property should be made between the parties, in case the Special Appellant should not wish to give maintenance : it being contrary to Judicial practice and precedent to declare an alternative for the option of the parties in a Suit. The Special Appellant is assessed with all costs.

No. 36 of 1850.

Decree dated 7th August 1851. *Page* 117 *M. V.*

1. The Original Suit was instituted to establish the right of the Plaintiffs to rebuild the bund of a Tank, and to appropriate the water collected behind it.

4. The Subordinate Judge considered that the Plaintiffs had failed to prove their right to erect the bund in question, and dismissed the Suit.

5. And this Decree was confirmed in Appeal by the Civil Judge.

6. In the application filed by the Plaintiff for the admission of a Special Appeal, it was urged—

* * *

3rdly. And that the document number 17, (the copy of the Civil Engineer's letter relative to the tank in question) was allowed to be filed in the Suit, and was considered by the Civil Judge, while it was legally inadmissible as evidence and opposed to Section XX, Regulation II of 1802, and Section XVIII, Regulation III of 1802.

7. A Special Appeal was admitted, on the ground that the Suit had been imperfectly investigated, and that a document had been improperly admitted as evidence on the record.

8. The Court observe that the Civil Court, although indicating by the course it pursued in disposing of the case the desirableness of an

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inspection of the locality by a competent person, received in evidence the letter No. 17, written by the Civil Engineer to the 16th Respondent subsequent to the disposal of the original suit, instead of deputing an Ameen to report on the matter, in accordance with Section XVIII, Regulation III of 1802.

9. It is true that the Civil Judge, when filing the letter in question, says, he " receives it not as evidence of fact, but as evidence of what opinion, whether right, or wrong, was entertained by the Civil Engineer," but how far the opinion of the Civil Engineer may have influenced the Judge in giving his judgment in the case, it is impossible to say, and, therefore, if the letter could not be received as evidence of fact, it ought not to have been received at all.

10. The Court of Sudder Udalut would also observe that, if the opinion of the Civil Engineer was deemed necessary for the correct determination of the suit under consideration, either the parties themselves might have cited him as a Witness, or the Civil Judge could have required his attendance, and taken his evidence in the usual way.

No. 39 of 1851.

Decree dated 20th August 1851. *Page* 119 *M. V.*

1. The Original Suit was instituted for the recovery of certain lands and trees, valued at Rupees 143-11-6 : and of Rupees 31-8-0, being the produce of the same for two years.

4. The District Moonsiff considered that it had been proved, that Vencoba was the Plaintiff's undivided brother, and was of weak intellect ; that the transfer of the Village by the Plaintiff to Vencoba was a mere matter of form, the Plaintiff having continued in actual possession even after the registry had been transferred ; that the Defendants had purposely neglected to cultivate the land, and, taking advantage of Vencoba's inability to provide for the cultivation, had frightened him into executing the Bills of Sale on which they relied, but for which no consideration whatever had been paid. He consequently set-aside the sales which, as having been made by one of two undivided brothers and without consideration, he held to be invalid, and decreed that the land should be

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surrendered to the Plaintiff. The produce claimed was, for want of clear and satisfactory evidence of its value, disallowed.

5. The Defendant Appealed, and the Subordinate Judge reversed the judgment of the District Moonsiff. He observes "that the evidence "adduced by the Original Plaintiff is not sufficient to justify the ousting "of the Appellants from the lands which they have been in possession "of. Upon the best consideration he is able to give to the arguments "or allegations on both sides, the Subordinate Judge sees reasons to "decide the cause in favor of the Appellants. On a petition present-"ed to the Board of Revenue by the Appellants, and by the Board referred "to the Collector, the latter Officer recorded the following endorsement, "'petitioners (Peracoodies) paid a portion of the balance due by the "'Meerassidar on his promising to repay them.' This he has now done "by the transfer of some land to petitioners, who are satisfied."

"Upon a review of the whole matter, the Subordinate Judge is of "opinion that the Appellants have established their right to the "land."

6. On the application of the Plaintiff, the Court of Sudder Udalut admitted a Special Appeal, the Decree of the Subordinate Judge being imperfect, inasmuch as the grounds on which he formed his opinion that the evidence was not sufficient to justify the ousting of the Appellants from the land, and that they had established their right to the same, were not set forth therein.

7. "The District Moonsiff in a Decree," the Subordinate Judge says "not censurable for excess of brevity" "entered into an elaborate "analysis of" "the evidence on both sides" and gave judgment in favor of the Plaintiff, and the Subordinate Judge in reversing this award ought, as laid down in Special Appeal, No. 110 of 1849, page 61 of the printed Decrees of the Sudder Udalut for 1849, to have fully stated his reasons for disbelieving the evidence on which the Lower Court relied.

8. It is the duty of the Judge in Appeal to go fully into the case as set forth in the judgment of the lower Court, and to record his opinion upon all the material grounds of decision *seriatim,* in the same manner as Judges are required to record their decision in Original cases; and to dispose of the resons which have weighed with the lower Judge for or

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against the claim, in such a manner, that the higher Court may be able to judge of the validity of his own reasons. The Appellate Court should assign its reasons for admitting evidence which has been rejected by the lower Court; and, if it discredit, as contradictory, the evidence on which the lower Court relied, it should clearly set forth the point, in which it perceives the contradiction.*

No. 41 of 1851.

Decree dated 25th August 1851. *Page* 122 *M. V.*

7. The Court of Sudder Udalut have frequently been called upon to remand Suits in consequence of the lower Court losing sight of the important provisions of Section X, Regn. XV of 1816, and they take this opportunity of quoting for the information and guidance of the lower tribunals the opinion of Her Majesty's Most Honorable Privy Council in the Appeal preferred from the Judgment of the Court of Sudder Udalut in the case No. 13 of 1835.

8. Their Lordships state "with regard to the question of law as far "as the opinion of the Pundits could determine it, there seems to have "been no difference, they have all stated in substance to this effect, that "the right and title to the Zemindary depended on the fact of division, "and the fact of division therefore was and is a most substantial question "to be determined in this case,—now their Lordships find upon an exami-"nation of all these proceedings that the fact of the division has never "been alleged in any of the pleadings. They find also that according "to the Regulations of 1816, the 15th Regulation that the division ought "to have been made a distinct point in the cause, and that an order "ought to have been given for the production of evidence in proof of "such an averment."

"Then it comes to this, that there has been no such averment, no such "point made and no such direction given, and how it was that the evi-"dence came to be taken on the one side or on the other with respect to "the question of division, no satisfactory explanation has yet been afford-"ed at the Bar."

* Macpherson, page 454.

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" Now their Lordships entertain a very strong conviction of the abso-" lute necessity of adhering to this Regulation, for it is in the first place " a Regulation, emanating from the highest authority, and is entitled to " the force of law, and it is in the second place one, in their Lordships' " Judgment, of the utmost importance for preserving the regularity of the " proceedings of the Courts in that Country, and for preventing constant " confusion and uncertainty as to what really are, or are not, the points " in litigation, and to which the evidence is to be directed. They con-" ceive that this Regulation has been most wisely framed, first, in affir-" matively directing that the points on which evidence is to be taken " shall be distinctly set forth, and that it shall be a duty imposed on the " Court, if those points do not appear to be sufficient for the final termi-" nation of the litigation, that they should state distinctly as a matter of " record the further points on which evidence is to be taken. Further, " the Regulation after having thus affirmatively stated what is to be done " goes on to state what shall not be done. 'In like manner if proof " 'shall be required on any other points in the course of the trial, such " 'points shall be recorded on the proceedings, and the proper party " 'shall be called upon for the requisite evidence, and no exhibit shall be " 'filed or witnesses summoned, unless expressly declared to be in proof " 'or refutation of some point upon which the Court may have directed " 'that evidence should be taken.' "

" Now this Regulation, important as it is, and most clearly expressed, " points directly against the course which has been unfortunately " adopted in this case, because the point on which the whole case turns, " and in the opinion of the Sudder Udalut beyond all question, the whole " case was decided, never was alleged as a point in any of the proceed-" ings, and the evidence which was read in support of it never was " directed or sanctioned by the Court."

" It is, in the opinion of their Lordships, therefore indispensably necessary for the purpose of supporting and securing the compliance with " this most wholesome regulation, that they should act in conformity " with it, and if they act in conformity with this Regulation, the inevitable " consequence is that they cannot sustain the decision of the Sudder " Udalut, because it is upon the ground of that point as the point of " division alone on which that Judgment rests."

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No. 44 of 1851.

Decree dated 28th August 1851. *Page* 125 *M. V.*

1. The Original Suit was instituted to recover possession of 2½ Khundies of land inherited by the Plaintiff from his Sister, (the widow of one Billacotty Chellannah) which had been leased in 1836 for 12 years to the husband of the 1st Defendant in satisfaction of a Bond executed by the Plaintiff for Rupees 600, viz. 300 Rupees then advanced and equal interest, and which it was alleged had, with the exception of 13 annas, been fully liquidated.

2. The Defendant contended that 600 Rupees were actually advanced to the Plaintiff, and that at the expiration of the Original lease in 1847, 910 Rupees were found due and a new lease was granted to them for 20 years.

3. The Moofty Sudder Ameen discredited the evidence adduced by the Plaintiff, and deeming the documents filed by the Defendant to be genuine, he dismissed the claim.

4. The Civil Judge in Appeal examined the record of a Suit filed by the Plaintiff against the husband of the Defendant in 1825, and came to the conclusion that, whilst the deeds of the 1st Defendant were worthless, the title of the Plaintiff to the land sued for was founded on fraud. He "therefore saw no reason to confirm the Original Decree so far as it "recognized the truth of Defendant's deeds or acquisition, but still less "to reverse it as regards the falseness of Plaintiff's title and transac- "tions" and dismissed the appeal.

5. Upon the application of the 2d Defendant, who urged that the Civil Judge was not justified in discussing the title of the Plaintiff to the land, the point not having been raised in the pleadings, and the Plaintiff's possession, with registry in the public accounts ever since 1825, not having been called in question by any one, a Special Appeal was admitted by the Court of Sudder Udalut, on the ground that the Civil Judge had not confined himself to the issues arising upon the pleadings, but had pronounced against the right and title of the Plaintiff to the land, which had not been questioned by the Defendants; this being a proceeding altogether irregular and contrary to the practice of the Courts.

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6. And the Sudder Udalut resolve to remand the case to the Civil Judge, in order that a fresh Decree may be passed strictly and exclusively on the issues arising upon the pleadings.

No. 45 of 1851.

Decree dated 28th August 1851. *Page* 127 *M. V.*

8. The Court of Sudder Udalut observe that the Special Appellant was represented by a Vakeel, during whose absence on leave, granted to him by the District Moonsiff, the Suit was put down for trial ex-parte and disposed of accordingly. This proceeding on the part of the Moonsiff was extremely irregular, and evinced great ignorance of, and inattention to his duties. The trial of petitioner's Suit could not under Section XIII Regulation XIV of 1816, so long as he was represented by a Vakeel of the Court, be declared ex-parte, and it was the bounden duty of the Moonsiff not to have so disposed of it during the pleader's absence.

No. 49 of 1851.

Decree dated 8th September 1851. *Page* 137 *M. V.*

11. It was the duty of the Assistant Judge to go fully into the case, as set forth in the Judgment of the lower Court, and to record his opinion upon all material grounds of decision, and to dispose of the reasons which have weighed with the lower Judge for and against, the claim, in such a manner that the higher Court may be able to judge of the validity of his own reasons. This course the Assistant Judge has not followed, but has left the Special Appellant and the higher Court very much to guess his reasons for arriving at a different conclusion as to the merits of the case to what the Sudder Ameen did. The Court of Sudder Udalut would also observe, that if the mortgage Deed could, in the opinion of the Assistant Judge, have been produced by the Plaintiff, then that no witnesses to its purport could be received, on the well understood principle, that the contents of a writing cannot be proved by mere oral evidence, if the writing itself be in existence and attainable, and that the inability of the party to produce the same, if in existence, or its non-existence, must be established in the clearest and

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most satisfactory manner, before parol evidence to its contents is admissible.

13. The Court of Sudder Udalut also direct that the attention of the Assistant Judge be called to the 11th para. of the Sudder Udalut Special Appeal Decree No. 11 of 1851, in which they direct that two Appeals, not strictly cross Appeals, should not be disposed of in one Decree, and further that Mr. Swinton be informed, that the phrase employed by him "the Court deem it right to affirm the Appeal", (Petition) is hardly intelligible. He should always state distinctly whether he "affirmed" or "reversed" the Decree of the Lower Court, and if the latter, as in this case, he should define precisely what he awards.

No. 50 of 1851.

Decree dated 8th September 1851. *Page* 139 *M. V.*

9. The Civil Judge ought to have gone fully into the case, as set forth in the judgment of the lower Court, and to have recorded his opinion upon all the material grounds of decision, in order that the higher Court might be able to judge of the correctness of the same.

11. The concluding paragraph of the Civil Judge's Decree, where he states that having fully explained to the parties the grounds on which the decision was passed, he deemed it unnecessary to enter them in the Decree, the Court of Sudder Udalut consider not creditable to Mr. —— a Judicial Officer of 35 years standing. He ought to have known, that the course he has here adopted is contrary to all practice, precedent and law, and that the grounds of every judgment and the evidence on which it is based, must be distinctly stated in every Decree.

No 53 of 1851.

Decree dated 18th September 1851. *Page* 141 *M. V.*

13. The Court of Sudder Udalut * * observe that the Acting Subordinate Judge, in adjudging the property in possession of the Defendant to be equally divided between herself, and Plaintiff, and two other widows, not before the Court, acted irregularly and contrary to practice.

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No. 13 of 1851.

Decree dated 20th September 1851. *Page* 147 *M. V.*

1. The circumstances of this case are as follows:

2. The Special Respondent, who is the widow of one Santuppa, petitioned the Head Assistant Collector to register the wurg of certain lands valued at 64 Rupees, the property of her husband, in the name of her paramour, Daneya, upon which the Special Appellant put in a claim to the said lands, alleging that the Mother of Santuppa mortgaged them to him in 1830, and that Santuppa in 1834 placed them in his possession. In support of these allegations he produced two Deeds, and he also urged that the payments of cist, upon which the Special Respondent relied as establishing her right, had been made on his account, Santuppa and after his demise, the Special Respondent having been entrusted by him with the management of the lands.

3. The Head Assistant Collector, after examining the Revenue Officers, the cultivators of the land and others, came to the conclusion that the Special Appellant had been in possession of the land since 1834, and he consequently refused to register the wurg in the Special Respondent's name, and directed that the cist should continue to be received from the Special Appellant.

4. An appeal from this order was admitted by the Civil Judge, who in his Decree set aside the decision of the Head Assistant Collector, and adjudged possession of the lands to the Special Respondent.

5. A Special Appeal was admitted by the Court of Sudder Udalut to try, firstly, whether or not the order issued by the Head Assistant Collector to the Peishcar was properly a judicial decision under the provision of Regulation V. of 1822, and as such, appealable to the Civil Court, and secondly, whether the decision of the Civil Judge, recognizing the Special Respondent's right to the land held by her deceased husband, was consonant, or not with Hindoo law.

8. The Court of Sudder Udalut observe, that the Civil Judge in his return to the Court's precept of the 27th September 1849, requiring him to explain if there was any thing to show that the order of the Head Assistant Collector of the 1st December 1846 was passed under Regulation V

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of 1822, says, that "it appeared to him, (the Civil Judge,) that the Head "Assistant Collector had directed the enquiry regarding possession, and "then decided upon that question under the provision of Sec. XI, Regulation V of 1822, the Civil Judge not being aware of any other law under "which the Revenue authorities were authorized to decide on such a point."

9. The Court remark, that the law quoted by the Civil Judge in support of the course he has adopted in this case is inapplicable. This law provides for immediate redress under forcible ejection, but in the present instance, there was neither ejection nor force used on the decease of Santuppa, the Special Appellant was in quiet possession of the land, in which he was very properly retained by the order of the Head Assistant Collector, and it was clearly for the Special Respondent, and not the Special Appellant, to establish by a Civil action, her right to the property in dispute.

10. The Court are further of opinion that the simple order of the Head Assistant Collector to the Revenue Peishcar, without any personal examination into the case, is not such a decision as is contemplated under the provisions of Regulation V of 1822.

No. 30 of 1850.

Decree dated 22d September 1851. *Page* 149 *M. V.*

1. The Original Suit was instituted for the recovery from the Defendants, of a House, alleged to have been purchased on the 5th February 1848, by the Plaintiff's brother (deceased) from the 1st Defendant, who caused the Bill of Sale to be registered in the Subordinate Court.

2. The 1st Defendant in his answer admitted the Plaintiff's claim.

3. The 2nd and 3rd Defendants asserted that the house sued for had been mortgaged to them on the 26th October 1843, and under the terms of the mortgage Bond became their absolute property on the 26th October 1845, when the term fixed for redemption expired.

4. The Acting Subordinate Judge awarded the house to the Plaintiff, he observed "a mortgagee has no claim whatever to the property mortgaged, his claim goes only as far as the amount of mortgage which he "may realize on the sale of the said property, in case payment is "refused."

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"The document alluded to by the 2nd and 3rd Defendants, be it "a Deed of Sale or a mortgage Bond, being unregistered, becomes invalid "under the provisions of Act XIX of 1843."

5. The 2nd and 3rd Defendants were assessed with the entire costs of Suit.

6. The 2nd and 3rd Defendants appealed to the Civil Court, and the Civil Judge reversed the Original Decree. He observed that the 2nd and 3rd Defendants had "not foreclosed their mortgage, as "they obtained no Deed from the 1st Defendant in evidence that this "had been done, and that the proprietary right in the house had been trans-"ferred to them, while the fact that this right still remained with 1st "Defendant is shown by his retaining the old title Deeds of the house, "so as to have transferred them to the Respondent more than two "years after the lapse of the time, under which the foreclosing of the "mortgage might have been effected. The Court thus considers the "Appellants to be still holding under their Original title of mortgage, "and hence that their Deed cannot be invalidated by that of the Respond-"ents under Act XIX of 1843."

7. Upon the application of the Plaintiff, the Court of Sudder Udalut admitted a Special Appeal, in order that the conflicting opinions recorded by the lower Courts in regard to the meaning and intent of Act XIX of 1843 might be brought under the consideration of the higher Court, and that the correct construction of that enactment might be authoritatively determined.

8. The Special Appellant contends that this registered Deed of Sale invalidates the mortgage held by the 2nd and 3rd Defendants, which was not registered.

10. The Court of Sudder Udalut having carefully considered the Decrees of the lower Courts and the provisions of Act XIX of 1843, are satisfied that the decision of the Civil Judge is perfectly in accordance with the spirit and letter of the law.

No. 63 OF 1851.

DECREE DATED 1ST OCTOBER 1851. *Page* 165 *M. V.*

13. The last para. of the Acting Principal Sudder Ameen's Judgment order, where he says, "so much of the Original decree appealed against

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is hereby reversed, and the part thereof not appealed from is confirmed," is too indefinite. All decrees must be expressed in the clearest and most precise language, and what they adjudge must be set forth in distinct and positive language.

No. 67 of 1851.

Decree dated 9th October 1851. *Page* 174 *M. V.*

6. The Court of Sudder Udalut on the 25th March 1833 recorded their opinion as to "the expediency of examining all the witnesses who may "be produced to prove each point, inasmuch as it is not possible for the "lower Court to determine, with any thing approaching to certainty, "as to whether or not the Court of Appeal may deem essential, evidence, "which, to the Court of Original Jurisdiction may appear superfluous."

"There is also the further ground for adopting this course, that the "rejecting of evidence tendered, by being made a ground of Appeal, coun-"teracts the object proposed of expediting the disposal of Suits."

7. The Court of Sudder Udalut observe that in the Suit under consideration, 37 witnesses were cited, but 6 only were examined by the Moonsiff.

8. The Court, therefore remand the case to the Civil Judge, who will refer the same to the District Moonsiff with instructions to follow the course pointed out in the Circular Order above quoted.

No. 72 of 1851.

Decree dated 27th October 1851. *Page* 186 *M. V.*

8. They observe that the Principal Sudder Ameen has admitted the occurrence of the Kararnamah pleaded, as arising out of a transaction "privately carried on between the two parties on certain unknown conditions," but has pronounced the deed invalid, as it had been disallowed by the late Provincial Court for the Southern Division, by their summary order upon it.

9. This ground of decision is irregular, for no summary order is

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conclusive against a claim which may become the subject of a regular Suit.

No. 19 of 1851.

Decree dated 3rd November 1851. *Page* 191 *M. V.*

1. The Original Suit was instituted for the recovery of Rupees 36, being the value of certain lace alleged to have been supplied to the deceased wife of the Defendant.

2. The Sudder Ameen awarded to the Plaintiff the sum sued for, but his Decree was reversed by the Civil Judge in Appeal, chiefly on the ground that the Plaintiff had failed to adduce evidence, either oral or documentary, to prove that the articles, the value of which was sued for, had been supplied.

3. Upon the application of the Plaintiff, a Special Appeal was admitted by the Court of Sudder Udalut under date the 20th August 1849, and the Suit was remanded to the Appellate Court for review of judgment, on the ground that the Civil Judge had omitted to call for and examine the Plaintiff's accounts; the Court of Sudder Udalut observing that, in transactions of the nature of that under notice, "a merchant's " accounts, if satisfactorily proved, constitute in themselves documentary " evidence, sufficient to establish a claim to payment for goods delivered."

4. On review, the Civil Judge confirmed the Decree originally passed by him in the Appeal. He observed,—" The writer of the book was " not named as a witness, and as no reference was made to this do- " cument in the Suit originally instituted, or even in the first Appeal, no " raliance can be placed on it, in fact, under no circumstances could " such a book be accepted as evidence, unless signed by parties after " examination, or else the regular accounts kept in proper order by a " merchant. Only one person has proved the delivery of the goods, who " is a discarded servant of the Appellant's late wife."

5. Upon the application of the Respondent, the Court of Sudder Udalut admitted a Special Appeal, on the ground that the Civil Judge had assigned reasons for rejecting the account produced by the Special Ap-

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pellant, which are not consistent with the practice observed by the Courts, in respect to such documents.

8. The Court of Sudder Udalut have to observe that the account book kept by the Special Appellant, and presented in this case, was clearly an admissible document, but that on taking it into consideration, to ascertain what degree of evidence can be derived from it, they can find none. The entries, as noticed by the Civil Judge, are such as may have been made at any time, and their existence, therefore, in no degree goes to prove that the articles described therein were supplied from time to time, as represented by the Special Appellant.

No. 81 of 1851.

Decree dated 10th November 1851, *Page* 209 *M. V.*

1. The Original Suit was instituted for the recovery of maintenance at the rate of 25 Rupees per mensem, on the plea that the Plaintiff had, without any cause, been cast off by the Defendant, her husband.

2. The Defendant alleged that the Plaintiff originally left his house of her own accord, and remained absent for six years, when she returned, but again voluntarily quitted him.

3. The Subordinate Judge adjudged the maintenance claimed, remarking in his Decree, " the Defendant, it is evident from his pleadings, has " no wish that his wife should reside with him; he simply denies having " sent her out of his house, but from his silence as to his opinion or " wishes regarding her absence, it is to be inferred that he has no fault " to find with her conduct, and in short that he would prefer her room. " In his deposition he says that he has no objection to give her allow- " ance, and only objects to the largeness of the claim made upon him."

" By *his own account* his income is not far short of 2,000 Rupees per " annum, and his expense 1,000 Rupees."

4. This Decree was confirmed, in Appeal, by the Civil Judge.

5. Upon the application of the Defendant, the Court of Sudder Udalut admitted a Special Appeal on the ground of informality and error in the proceedings of the Lower Courts, and of defects in the Decrees.

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6. The Court of Sudder Udalut have to observe, that in a Decree for maintenance it is needed that it should be clearly laid down upon what grounds, as arising out of the conduct of the party having to pay maintenance, such award is made; and that in the present case this question has not been taken into consideration, or pronounced upon.

7. The Court further find that the points to be proved by the respective parties in this case were not laid down for their guidance.

8. They also find that the institution and Vakeel's fees, which should have been calculated upon the sum of the maintenance sued for as due for one year, have been estimated irregularly upon some higher rate.

9. On the above grounds the Court of Sudder Udalut admit this Special Appeal, and resolve to remand this Suit to the Court of Original Jurisdiction, in order that the above stated defects in the trial and disposal of the Suit may be remedied, and a fresh decision therein passed.

No 43 of 1849.

Decree dated 27th November 1851. *Page* 226 *M. V.*

1. The Plaintiff instituted this Suit to recover the Estate of her deceased husband, Appacoottien, consisting of land and various moveable property, valued altogether at 50,000 Rupees.

2. She represented that her husband, being attacked with fever in the month of Avany of Crodhee, (August and September 1844,) desired her to adopt a son in the event of the child, with which she was then pregnant, being a girl; that from that time his sickness increased, till on the 10th of the same month he became delirious and speechless, and remained in that state till his demise on the 22nd. That she (Plaintiff) having given birth to a female child the relatives of her husband wanted her to adopt a son of their nomination, which she refused to do, and having thus incurred their resentment, they conspired with the 1st and 2nd Defendants and others, and while her husband was on his death-bed trumped up two Deeds purporting to be Wills, by virtue of which they took possession of the Estate. That having complained to the Joint Magistrate of this illegal assumption, he on the 1st of May 1845 directed the Police Officers to put her (Plaintiff) in possession, which was ac-

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cordingly done. This order was, however, reversed by the Magistrate, on Appeal, on the 12th July following.

3. By the 1st and 2nd Defendants it was contended that for several generations the family of the Plaintiff's husband had devoted a large part of their property to religious and charitable purposes, in the disposal and management of which they had always been assisted by the ancestors of the 1st Defendant. That when the Plaintiff's husband was taken ill he sent for the 1st and 2nd Defendants, and on 18th Avany (31st August) executed a will in general terms constituting them executors and managers of his Estate; and that subsequently, or on the 21st of the said month, he caused a codicil to be added by which he left a separate provision for his wife, daughter and other female relations, and the rest of his property to religious and charitable uses, with a proviso, that, if his wife, then pregnant, bore a son, the Estate should revert to him on his coming of age, remaining under the management of the 1st and 2nd Defendants until that period.

8. The Civil Judge was of opinion that the Defendant's evidence, oral and documentary, fully proved the will and codicil to have been duly executed, and that the deceased was in the full possession of his senses at that time. The evidence adduced by Plaintiff to establish the contrary the Civil Judge considered inconclusive, and unworthy of credit.

9. The next points therefore for the Civil Judge to decide were.

1st. Whether the will in question was valid?

2nd. Supposing the deceased gave his wife verbal instructions to adopt a son in the event of her bearing a daughter, would her compliance with those instructions operate to invalidate the will, in which no mention is made of adoption?

10. The Pundits of the Sudder Udalut, to whom the above questions were referred, decided the 1st question in the affirmative, and, with regard to the 2nd, they observed that, if the testator had given instructions to his wife to adopt a son, her compliance with those instructions would invalidate the will.

11. It therefore, only remained for the Civil Judge to determine whether, as stated by Plaintiff, her deceased husband had authorized her to adopt; and to establish this point, he, the Civil Judge considered

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Plaintiff had failed to adduce sufficient proof, and, being of opinion that the last wishes and intentions of the deceased were contained in the will and codicil to it, he dismissed the Suit, assessing Plaintiff with costs.

12. From the above Decree the Plaintiff now appeals urging,

* * *

"3rdly. Upon the face of the will, it is clearly illegal and void under "Regulation V. of 1829 for it is contrary to Hindoo law which declares "that, if a Hindoo shall die without male heirs within the 3rd degree, his "estate shall rest in his widow in trust for his heirs, who in this case are "the deceased's daughters and their issue; thus, this alleged will, even "supposing it to be valid, is clearly illegal, and must, it is submitted, be "declared void."

20. The 3rd objection taken by the Appellant is, that the will is illegal, because the widow is the party to whom the law gives the estate.

21. The Court have referred to all the authorities quoted by the Appellant in support of this position, and find that, although the opinions regarding wills of Hindoos, generally, are conflicting, yet that the majority of them are against the argument of the Appellant.

22. It is unnecessary to cite all the opinions given on the subject, and the Court will content itself by referring to the case of Ramtoonoo Muluck versus Ramgopaul Muluck, in which it was held that a Hindoo might and could dispose by will of all his property, moveable and immovable, and as well *ancestral* as otherwise; and this decision was affirmed on Appeal by the Judicial Committee of the Privy Council.

Morley digest, page 39. Nos. 3 and 4.

23. Questions however regarding the legality of the will now under discussion were referred to the law Officers of the Court, to whom the legislature have assigned the duty of declaring the law on such matters, and they distinctly stated their opinion that it is a valid and good instrument. The arguments, therefore, of the Appellant, that it is not recognizable under the provisions of Regulation V of 1829, cannot be sustained.

24. The Court of Sudder Udalut for the above reasons affirm the Decree of the Civil Court, and dismiss this Appeal with costs.

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No. 11 of 1849.

Decree dated 29th November 1851. *Page* 234 *M. V.*

1. This Suit was originally instituted by the Plaintiffs, Special Appellants, for the recovery from the Special Respondents and five others of $\frac{2}{4}$ pungoo, or share, of Malgoozary Nunjah and Poonjah lands, valued at Rupees 37-8-0, a thatched house and backyard with certain trees standing thereon, valued at Rupees 35-0-0, together with past produce, including the value of trees cut down and carried away by the Defendants, Rupees 36-8-0.—Total Rupees 109-0-0.

7. The Sudder Ameen, considering that Plaintiffs' Documents A and B were satisfactorily proved, and that it was also established that Baula Gooroovuppa Naick had attested the mortgage Bond executed by Plaintiffs to Arnachella Pillay in 1841, adjudged to Plaintiffs the lands claimed with 25 Rupees, the value of the trees cut down, but disallowed the remainder of the claim as not having been proved.

9. A Special Appeal was thereupon preferred by the Defendants, which the Court of Sudder Udalut admitted on the ground that the most important point in the case, viz. the right and the title of Baula Gooroovappah Naick to execute the Deed of Sale A to Soobba Naick had not been noticed in the Appeal Decree, and that even in the original Decree it had not met with the attention to which it was clearly entitled.

10. They observed that the property under litigation was, it appeared, the hereditary estate of three brothers, of whom the Special Appellant's husband was the eldest, and Baula Gooroovuppa Naick the second, and it was contended that the Special Appellant's husband had, by adoption, forfeited his right to his share in the paternal estate, that the legality of this adoption, he being the eldest son of his father, if it even took place, was called in question, and that this point should have been referred for the opinion of the Hindoo Law Officers of the Court of Sudder Udalut.

11. The Suit was then remanded for reinvestigation by the Civil Judge, in order that he might take into consideration the fact of the alleged adoption and its legality according to Hindoo law.

12. The Civil Judge, having taken additional evidence on the point

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in question, passed a revised Decree in which he observed that, " as far " as positive proof went, the alleged adoption was not proved, but that the " circumstantial evidence to that fact was so strong as to leave but little " doubt that it did take place." Having, however, consulted the Law Officers of the Sudder Udalut as to the legality of the said adoption, and received for answer that the adoption of an eldest son is not valid under Hindoo law, he considered that fatal to the Plaintiff's claim, and therefore he set aside the original Decree; but being of opinion that " Re- " spondent's father had, no doubt, acted with good faith and had good " ground for supposing that Baula Gooroovuppa Naick was legally com- " petent to sell the land, for which a fair price was paid," adjudged the parties to pay their own costs respectively.

13. The Respondents, in their turn, preferred a Special Appeal from the above Decree, urging that in consequence of the adoption of his two brothers Baula Gooroovuppa Naick succeeded to, and had sole and entire possession of, and control over, the property of his father Gopaula Naick, the merassee being entered in his name in the Circar accounts; that eldest sons are adopted even among the Bramins in the Zillah of Combaconum, and therefore it cannot be illegal among Soodras, to which caste the parties in this Suit belong; that final Decrees have been passed recognising the validity of such adoptions according to the futwahs of former Pundits, copies of which they are ready to produce; that Rama Naick performed the funeral ceremonies of his adoptive father and mother, and executed Deeds of Sale and attested various documents as adopted son of his Uncle Gooroomoorty Naick; but that it was not proved that he performed the obsequies of his natural father.

14. The Court of Sudder Udalut, having taken into consideration copy of a Decree of the late Acting Zillah Judge of Combaconum, in which the adoption of an eldest son is declared to be valid in an opinion delivered by the Sudder Ameen Pundit of that Court, and finding it stated in Sir Thomas Strange's Work on Hindoo Law, that such an adoption, however blameable it may be in the giver, would nevertheless be, to every legal purpose, good and valid, and that therefore there was still room to doubt whether the Hindoo Law on the point in question had been correctly interpreted, were induced to admit a Special Appeal a se-

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cond time in order that the point might be further considered and decided authoritatively.

15. The following question was accordingly put to the Hindoo Law Officers of the Sudder Udalut.

Question to the Pundits.

" Under the Hindoo law, is the adoption of an eldest, or only, son " legal, when effected by his paternal uncle? If so, would the legality of " such adoption be affected by any division or non-division of proper- " ty which may have taken place between the natural and adoptive " fathers of the boy adopted"?

" Authorities to be cited."

16. To which the following answers were received from the Senior and Junior Pundits.

Answer of the Senior Pundit.

" The law book, 'Dutta Mimansa of Nunda Pundita' sanctions the adoption of an only son by his paternal uncle destitute of male issue. When such sanction is given, in case where a man has no more than an only son, there can possibly be no objection to the adoption of the eldest son of a man who has other sons alive."

" The legality of the above adoptions cannot be affected by the division or non-division of property which may have taken place between the natural and adoptive parents of the boy adopted."

" The authority for the above is the law book of Nunda Pundita above " referred to."

Answer of the Junior Pundit.

" The law Books 'Vijnanswereyem,' 'Smoortichendreka,' &c. clear- " ly prohibit the gift or acceptance of an only, or eldest son, for " adoption, under the text of 'Vasistha', which declares,—'Let no man " give or accept an only son, for he is (destined) to continue the line of " his ancestors, nor should an eldest son be given.' Further the said law " book 'Smoortichendreka' after forbidding the gift of an only son, de- " clares that in the event of his being given, such gift shall be cancelled " by the King, none of the law givers (sages) authorize the adoption of " the said sons among brothers."

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" But the law book 'Nunda Punditeyem' otherwise called 'Dutta " Mimansa' declares that a man can give his only son in adoption to his " brother, and that such son becomes Dwyamushyayana', or son to both. " In support of this dictum, the said book quotes the story of 'Vitala " and Bhairava' contained in 'Kalika Púrāna.' But on looking over " this story, it does not appear to be sanctioned by the usage of the " present age."

" For these and various other reasons, the adoption of the eldest, or " an only son, referred to in the question, cannot be considered legal, " nor is it affected by the division or non-division of the family."

17. The foregoing answers being in direct opposition to each other, and that of the Senior Pundit being contrary to one he had formerly given in the same Suit when pending before the Civil Judge, the following further question was put to that Officer.

Question to the Senior Pundit.

" With reference to your answer of the 3rd Instant declaring the " adoption of an eldest son valid, you are desired to state how it can be " reconciled with the concurrent opinion given by you and the Junior " Pundit of this Court on the 3rd April 1848 repudiating the validity " of the said adoption."

" You are further required to cite the legal passages, authorizing the " above adoption in as plain and express terms as " those in which it is prohibited by *'Mitacshara' " without any reservation or exception whatever, the inferential reason- " ing contained in your answer, under remark, being considered unsatis- " factory."

* Page 310 para. 12.

18. And the following answer was obtained thereto.

Answer of the Senior Pundit.

" In the Book entitled 'Smoorte Mookla Palum' or 'Vydyanatha " 'Dectchteyum,' Chapter upon 'Pollution,' the author, referring to the " prohibition of the gift or acceptance of an eldest son, observes that 'it " is stated in Trikandy that in case an eldest son be given through " mercenary motives, contrary to the said prohibition, he alone, though " so given away, shall, on the death of his natural father, perform his

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" burning and other ceremonies, notwithstanding the existence of his " other sons.' Accordingly, Paruskara says:—' Though given away, a son " shall not forfeit the wealth and gotrum of his natural father since " Menu declares him to be still connected with both.' Such son alone " is allowed by certain authors to be ' Dwyamushyayana' who is en- " titled to succeed to the property of both his natural and adoptive " fathers. These passages warrant the conclusion that the gift of an " eldest son for adoption is valid, a conclusion which is conveyed also " in the Book called 'Datta Mimansa' of Sree Rama Pundita, Chapter " on ' Pollution.' As ' Nunda Pundita' declares that the prohibition of " the adoption of an only son does not apply to the only son of a brother, " I concluded, by parity of reasoning, that the prohibition of the adop- " tion of an eldest son does not apply to the eldest son of a brother. " On considering simultaneously the aforesaid authorities, I am im- " pressed with the conviction that the said prohibition refers, not to a " brother's son, but to other than nephews. It is upon this conviction, " that I have founded my answer of the 3rd Instant. Having made " the several books of the Hindoo law the chief object of my study, " since my appointment as Pundit to this Court, I have become so fa- " miliar with them that all of them presented themselves to my recollec- " tion at once and induced me to frame my said answer to the effect " mentioned above."

" As regards my answer, dated 3rd April 1848, I beg to observe that " the above authorities not having come to my recollection at the time, " I was led away by an idea that the general prohibition contained in " ' Vijnanaswareyum,' &c. might apply also to the son of a brother. I " therefore gave the said answer accordingly."

19. The opinions of the Pundit clearly shew that as a general rule the adoption of an eldest, or of an only son, is an act alien to the principles of Hindoo law. The reason of this is obvious, that the eldest son is the stated person upon whom the father should depend for the performance of those obsequial rites to which the Hindoos attach such importance. It appears, however, according to the Senior Pundit, and the authorities he has cited, that an adoption of an eldest, or of an only son, by a paternal uncle, but by none other, is sustainable and Sir Thomas Strange (Vol. I. page 87) has given it as his belief that " with regard

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" to both these prohibitions respecting an eldest and an only son, where " they most strictly apply, they are *directory* only, and an adoption of " either, however blameable in the giver, would nevertheless, to every " legal purpose, be good, according to the maxim of the Civil Law, pre- " vailing perhaps in no code more than in that of the Hindoos, *factum* " *valet quod fieri non debuit.*"

20. In the present instance the adoption was by a paternal uncle, and having thus taken place, though a thing to have been avoided, it must be held to be valid. The Court of Sudder Udalut find however that the Special Appellant's claim remains nevertheless an untenable one, as such adoption does not take the adopted out of his natural father's family, the effect of it being that he is to inherit under his adoptive parent without losing inheritance under his natural one " becoming," as Sir Thomas Strange states in correspondence with the citations made by the Senior Pundit, " Dwyamushyayana, or son to both." (page 86) Rama Naick having thus continued in the eye of the law a member of his natural father's family, notwithstanding his adoption by his uncle, his consent to the deed under which the Special Appellants claim the property in litigation could not be dispensed with, and as such consent was wanting, the deed becomes void.

21. For these reasons the Court of Sudder Udalut dismiss this Appeal, and adjudge the costs thereof to be discharged by the Special Appellants.

No. 96 of 1851.

Decree dated 22nd December 1851. *Page* 255 *M. V.*

1. The Original Suit was instituted for the recovery of a piece of ground valued at Rupees 15, with arrears of rent amounting to Rupees 11-1-4, which it was alleged the 1st Defendant had rented from the husband of the Plaintiff.

4. The Sudder Ameen considered it to be fully established that the ground belonged to the Plaintiff, and he accordingly decreed in her favor.

5. The Decree of the Sudder Ameen was reversed by the Assistant Judge.

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6. Upon the application of the Plaintiff the Court of Sudder Udalut admitted a Special Appeal, on the ground that the proceedings in the Assistant Judge's Court had been irregularly conducted.

7. The Court of Sudder Udalut find that the provisions of Section XIII, Regulation III of 1802 were not observed by the Assistant Judge in the issue of notification to Special Appellant of the institution of the Appeal against the Original Decree by the Sudder Ameen, which had been passed in her favor, whereby she had not due opportunity of defending herself before the Assistant Judge in the said Appeal.

8. It appears that return was made to the notice issued to her to the effect that the Special Appellant was at Negapatam. Thither a fresh notice should have been forwarded to her; but that step was not taken, and a further irregularity was committed in fixing the Original notice on the Special Appellant's house, by way of proclamation of the Suit, whereas a fresh process to be so affixed should, if ultimately found necessary, have been issued.

9. Under these circumstances the Court of Sudder Udalut resolve to remand the Suit to the Assistant Judge in order that Special Appellant may have the opportunity of defending herself in the said Appeal, and that a fresh Decree therein may be passed.

No. 6 of 1847.

Decree dated 31st December 1851. *Page 262 M. V.*

1. This action was originally brought by the Plaintiffs, (Special Respondents) to recover from the Defendants (Special Appellants) the sum of Rs. 12-2-2 as arrears of Cundayam, including interest due according to Pottah, and the Putcut accounts for certain Nunja and Poonja lands and trees, situated in the Village of Sodapoorum belonging to the "Annadanaputty Mottah" the whole annual rents of which amount to Rs. 40-9-8, and for an injunction to oblige the Defendants to exchange Pottahs and Moochilkas with them.

2. The Plaint set forth that Plaintiffs, having rented the said Village from the Moottahdar for the years 1842 and 1843, inspected the

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lands, trees, &c. according to the custom prevailing in the said Moottah, and on the 23rd November 1842 prepared a Pottah for the Fysul Teerwa, Rupees 40-9-8, and tendered the same to the Defendants who refused to receive it, or to give a Moochilka, in consequence of which the Pottah was deposited in the village Choultry, and the sum of Rupees 11-12-2 remained uncollected, Rs. 28-13-6 having been paid. Plaintiffs accordingly sued for this balance and interest thereon, annas six, with further interest up to date of payment.

3. The Defendants, in answer, admitted having received a Pottah for the lands in question from the 1st Plaintiff (the former renter) on 15th March 1840 for Rs. 28-13-8, which rent they still continue paying, but declared that the present renters should have issued Pottahs and received Moochilkas in the month of Chitri (April) and not in Arpesy (November;) and that in the event of parties refusing to receive Pottahs they can only be deprived of their lands by order of the Collector; they added that Suits for land revenue unsupported by Pottahs and Moochilkas should be dismissed under Sections II and VI, Regulation XXX of 1802, that the demand for tree tax is illegal, that the former renters had collected Teerwa according to the terms of Defendants' Pottah for 15 years, and that the Istimrar sunnud, Hookumnamah and Regulations prohibit Moottahdars and renters levying more than the Fysul rents regarding which several Decrees have been passed.

4. The District Moonsiff decreed that the Defendants should receive the Pottahs tendered, give Moochilkas and pay the Cundayem rent and Teerwa fixed on the areca and cocoanut trees, &c. and betel gardens as other Ryots in the said Moottah do, at the rate claimed, and adjudged them to pay Rupees 10-12-2 for arrears of Teerwa (one Rupee being deducted which was claimed in excess) with interest, six annas, and further interest up to the date of payment, and costs of Suit.

5. The Defendants appealed, adverting to Decrees prohibiting excessive Teerwah being levied on Poonjah lands converted into Nunjah and Totum at the cost of individuals, and urged that the Respondents should be punished for demanding rents in excess of those specified in the Pottah.

6. The Respondents, in answer, referred to several other Suits in which Decrees have been passed recognizing the right to levy the progressive

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tree tax, at the rates claimed in the Moottah in question, and stated that the Pottah was passed in the month of Kartegay (December) according to the custom prevailing in the village.

7. The Civil Judge confirmed the District Moonsiff's Decree, on the grounds that it was shown by the Decree in Appeal Suit, No. 102 of 1842 (which adverts to those of the Provincial Court Nos. 1 and 3 of 1833 and those of the late Register in Nos. 12, 13 and 14 of 1841, against which the applications for the admission of Special Appeals were rejected under Section IV, Regulation XV. of 1816) that the progressive tree taxes, at the rate claimed for areca and cocoanut trees, were levied in the Annadanaputty Moottah, that the Court of Sudder Udalut had dismissed the application for Special Appeal in their proceedings of 22nd October 1844 finding " no grounds for calling in question the correctness of a " decision formed upon what is proved to be the established custom of " the particular part of the country in question," that the Defendants admit that the former holders of the lands, as well as themselves, enjoyed the produce of trees, which the four witnesses examined for the Plaintiffs prove existed as set forth in the Plaint, and that the refusal of the Pottah is proved by the said witnesses one of whom is the curnum. The Civil Judge moreover observed that the Suits adverted to by Appellants merely refer to lands converted into Nunjah and Totum, watered from wells sunk at private cost, and not to areca and cocoanut gardens, on which the progressive tree tax has frequently, as above shown, been declared to be due. Appellants were adjudged to pay all costs.

8. The Defendants being still dissatisfied preferred a Special Appeal to the Court of Sudder Udalut, contending as before, that the exaction of a progressive rent on areca and cocoanut trees, &c., and betel gardens is illegal and contrary to Section I, Regulation XXV. and Section VII, Regulation XXX. of 1802; that Fysul rent was fixed on their Putcut lands at certain rates, according to which they, as well as former Puttahdars, have always continued to pay, that they, at their own expense, formed a garden on the Poonjah land after the Fysul rent was so fixed; that the extra rent now claimed is equal to twenty times the said Fysul rent, and that the Decrees passed in Special Appeals Nos. 5 of 1830 and 10 of 1835 on the file of the Provincial Court for the Southern

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Division, as also Decrees passed in the Salem Zillah and Appeal Courts, have decided that *no rent should be raised.*

9. The Court of Sudder Udalut admitted a Special Appeal on the ground that the Decrees of the Lower Courts appeared to be opposed to the provisions of Clause 2nd, Section VIII, Regulation V. of 1822, in which is laid down the course to be pursued when a party refuses to receive a Puttah tendered by a proprietor or farmer.

10. And an order was issued to the Civil Judge to replace the Suit on his file, and pass judgment therein *de novo*.

11. The Court of Sudder Udalut, having been afterwards led to reconsider their former order by a motion presented by the Special Respondents saw reason to think that Clause 2nd, Section VIII, Regulation V. of 1822 was not applicable to the case, as both the Clauses of that Section as well as Section X, Regulation XXX of 1802, referred to in Clause 1st provide for cases in which the proprietor or farmer may seek to oust the under-farmers or ryots, and give the lands to others, which is not the case in the present instance.

12. They however considered that the admission of the case to a Special hearing was necessary as it involved in its decision questions of general interest, which required an authoritative announcement, and that it was, moreover, desirable that it should be finally disposed of by a Decree of the Court of Sudder Udalut.

13. The Civil Judge of Salem was accordingly directed to retransmit the Special Appeal petition to the Sudder Udalut together with the entire record of the Suit.

14. The Court of Sudder Udalut proceed to pass judgment in this case.

15. The Plaintiffs aver that their demand is based upon a custom, or usage, that has always prevailed in the Moottah in question of levying a progressive rate of Teerwah upon areca and cocoanut, &c. trees and betel gardens newly formed on the Poonjah lands, and the Defendants on the other hand resist this claim on the ground that a Fysul rent was formerly fixed on their Putcut lands, at certain rates, and that the demand for any thing in excess of that rent is illegal and contrary to Regulation XXV and Section VIII, Regulation XXX. of 1802.

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16. The points for consideration therefore appear to be, 1st, whether this increased rate of assessment comes under the prohibition contained in Section VII, Regulation XXX of 1802; and, 2nd, whether such a custom as that contended for has really always obtained in the Moottah in question.

17. The said Section runs thus, " proprietors and farmers of lands " shall not levy any new assessment, or tax, on the Ryots under any " name or under any pretence; exactions other than those consolidated " in the Puttah, or otherwise authorized by Government, shall upon " proof subject the proprietor, or farmer, to a penalty equal to three " times the amount, of the exaction," which exactions are explained in the preceding Section VI to be " collections under various denomina- " tions in addition to the proprietor's share, such as canongoe and ca- " velly Russoms, or other charges."

18. It appears to the Sudder Udalut that the increased assessment now claimed is not of the nature of a " new tax," or of an " exaction" such as those contemplated in the above quoted sections.

19. Certain rates were fixed as the maximum Teerwah on different descriptions of land at the time of the permanent settlement, which rates cannot, of course, be raised so long as the lands remain under the same cultivation, whether Nunjah or Poonjah, &c., but the same rule does not, in the Court's opinion, apply when lands are improved by converting Poonjah into Nunjah, and Nunjah into Totakal, or garden, cultivation.

20. It is true that various conflicting decisions have been passed on the subject, but those which carry most weight and authority with them are in favor of the Plaintiff's claim, on the same grounds which are stated above.

21. In Original Suit No. 211 of 1831, for instance, the Zillah Judge of Salem decided in favor of a precisely similar claim in respect to lands situated in the very same Moottah, on the ground that the demand was sanctioned by long established custom, and that it was not contrary to Law, setting forth some very strong arguments to show both the reasonableness and necessity of such a tax being allowed.

22. The said Decree was confirmed in Appeal by the late Southern Provincial Court which was of opinion that, " the usage insisted on by

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"the Respondents is satisfactorily established in evidence, and there is "nothing to show that they, in raising the Teerwah on the Appellants, "have exceeded the rate fixed by the Circar, as a maximum on the lands "of the description of those under consideration when the village was "under amany."

23. Moreover the Court of Sudder Udalut in their proceedings under date the 22d October 1844 rejected an application for the admission of a Special Appeal from the Decree of the Civil Judge of Salem in Appeal Suit No. 102 of 1842, in which a similar claim was litigated between certain other parties in the same Moottah, and in which the same points were put in issue, and the same judgment passed, and the Court therein explained that "the sections quoted" (the same quoted by Defendants, Special Appellants, in this case) "prohibit Moottahdars "from exacting from Ryots payment of taxes, or assessment, not included "in the Puttahs granted to them; but the Court do not understand "them to declare that land which is improved (such as being raised from "Poonjah to Nunjah, or to Totakal) shall not, according to the custom "which may be found to prevail in the part of the country in which the "lands may be situated, be liable to pay increased rate of rent to the "Moottahdar."

24. That such a custom has prevailed for a long time in the said Moottah is declared by both the Lower Courts to be a fact established beyond all doubt.

25. The Court are therefore of opinion that the claim is both just and legal, and that the Decrees of the Lower Courts should be affirmed, and the Special Appeal dismissed with all costs of Suit.

1852.

No. 20 of 1852.

Decree dated 11th March 1852. *Page* 17 *M. V.*

1. The Plaintiff in the Original Suit sought to recover from the Defendant certain lands and a house valued at Rupees 134-15-0, which she had given to her daughter on her marriage with the Defendant,

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and which she, Plaintiff, contended should revert to her as her daughter died, leaving no issue.

2. The Defendant asserted his claim to succeed to the property in right of his wife, as the same had been given to her as Streedhanum.

3. The Moofty Sudder Ameen who tried the Original Suit was of opinion that, as the daughter had no issue, the property which had been given to her by her mother should devolve on the husband, as the heir to his deceased wife. He, therefore, dismissed the plaint, adjudging each party to bear their own costs.

4. The Plaintiff appealed, and the Acting Civil Judge, concurring in the view taken of the case by the Sudder Ameen, confirmed the original award with costs.

5. On a Special Appeal being preferred, the Court of Sudder Udalut in their proceedings dated 30th December 1818, sent back the case for reinvestigation. The Court observed that their Law Officers had declared that, if the marriage of the deceased had been conducted under any of five forms enumerated, then, the husband would be entitled to retain the property given to his wife as Dowry, but if under any of three others specified, then, the property would revert to the mother who gave the Dowry, and that it was essential for the correct disposal of the case to ascertain under which of these forms the marriage had taken place.

6. The Suit was accordingly replaced on the file of the Moofty Sudder Ameen, who, after taking fresh evidence, came to the conclusion that the marriage had been performed under the form termed "Asoora," one of the three which entitled the mother to succeed, and he accordingly decreed in her favor.

7. The Civil Judge again remanded the Suit for further enquiry, observing that he could not agree with the Sudder Ameen that the depositions of the parties showed the marriage to have been performed under the form "Asoora"; that it was admitted by both parties they were ignorant of the particular form under which it took place; that while the Plaintiff averred she received 50 Poons from the Defendant for herself, he affirmed that his bride was given as "Kunnikadanum" (or in gift.) On this point therefore the parties being directly at issue the

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Moofty Sudder Ameen was instructed to give them an opportunity of proving their respective allegations.

8. Evidence having been taken on both sides, the Sudder Ameen took a different view of the matter, and being of opinion the Defendant had proved that the Plaintiff had given her daughter in marriage as "Kunnikadanum," he decided for the husband's right.

9. The Plaintiff appealed from this decision to the Civil Judge, who modified it in the following terms:—

"There is no particular reason for giving the preference to the witnesses "of either party, and as such a length of time has elapsed since the marriage "took place, it is not very likely that any of them can know much about "the point at issue, since it was one in which they had no actual concern "beyond that of guests on the occasion; and, considering the great uncer-"tainty that hangs over the matter, it seems to the Civil Judge that the "fairest way to decide it will be to divide the property between the "claimants."

"And the Court decrees that the property at issue be equally divid-"ed between the Plaintiff and the Defendant; each party to pay their "own costs."

10. In support of the application for the admission of a Special Appeal it is urged:—

1st. That the Decree of the Civil Judge does not determine in any way the rights in dispute between the parties to this Suit, and, therefore, this Decree is contrary to the practice of the Courts, and does not comply with the requisitions of the Regulations.

2ndly. That the Civil Judge has reversed the Decree of the Sudder Ameen in respect of a fact found and declared by him on the evidence, without recording his reasons for so doing; and,

3rdly. That the Decree of the Civil Judge is null and void, in that it does not determine the main fact upon which the whole case rests, and for the determination of which this Court remanded the case for re-investigation.

11. The Court of Sudder Udalut consider that it was incumbent on the Civil Judge to have given a distinct judgment as to the title to the pro-

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perty in dispute, and not have passed an award partaking of the nature of a compromise between the parties, who had expressed no assent thereto.

12. The Court of Sudder Udalut consequently resolve to admit a Special Appeal, and to remand the Suit to the Civil Judge with directions to replace it on his file, and pass judgment on the point at issue.

No. 22 of 1852.

Decree dated 18th March 1852. *Page* 22 *M. V.*

1. The Original Suit was instituted before the Hindoo Sudder Ameen of Chittoor by one Nama Ramasawmy Chetty for the recovery from the Special Appellant of the sum of Rupees 489-14-8, being the one-thrid share of the amount of a Rauzeenamah recovered by the Special Appellant, on account of himself and his two nephews, by one of whom the share due to him had been transferred to the Plaintiff, the Defendant not having accounted for it.

2. The Hindoo Sudder Ameen decided that the alleged transfer of the share sued for was irregular, the property of which the said share was a part, being the common property of an undivided family, and he accordingly dismissed the Plaintiff's claim with costs.

3. The Plaintiff appealed to the Civil Court contending that the transfer deed was proved and that the family was divided, and he adverted to a note at the foot of the Rauzeenamah to the effect that the shares should be divided. On his application, four additional witnesses were examined by the Appellate Court, who deposed that the family was a divided one.

5. The Civil Judge decided that the family was a divided one, and that the transfer was valid, and awarded to the Plaintiff a fourth share of the amount recovered under the Rauzeenamah, viz. Rupees 350-13-6, the note appended to it showing that one-fourth, and not one-third, was the share due to the individual who had made the transfer to the Plaintiff (Special Respondent).

6. The Special Appellant, in support of his application for the admission of a Special Appeal, contends that the transfer was

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not valid, the family not having been regularly divided; that it was not competent to a Court of Justice to entertain a Suit for a sum of money transferred under such circumstances, and that the examination of further evidence by the Appellate Court was in contravention of the rule laid down in the circular order of the 27th August 1829.

7. The Court of Sudder Udalut resolve to admit a Special Appea in this case on the ground that it is contrary to judicial practice for the Court of Appeal to take fresh evidence on a point which arose out of the claim (the subject of the Suit) but which, having been hastily dismissed by the Court of Original Jurisdiction, did not form the subject of any sufficient enquiry.

8. And the Special Appeal having been admitted, the Court of Sudder Udalut resolve to return the Suit to the Zillah Court with instructions to remand the Suit to the Sudder Ameen in view to the question, whether the family was a divided or an undivided family, being determined after further evidence has been heard to that fact.

9. And for the information of the Zillah Judge, and for the future guidance of the Sudder Ameen, the Court of Sudder Udalut resolve to point out that the latter Officer's Decree is incomplete in that it does not contain a statement of the points which each party was required to prove.

No. 23 of 1852.

Decree dated 22d March 1852. *Page* 23 *M. V.*

1. The Original Suit was instituted for the recovery of Rupees 25-0-0 with interest, being the hire of a Pattimar alleged to have been engaged by the Defendant, in December 1848, for the purpose of conveying the family of the Principal Sudder Ameen Appalaya to Honore.

4. Both the Lower Courts concurred in rejecting the evidence adduced by Defendant to prove the payment of the boat hire, and in considering his fraudulent appropriation of the money given to him for that purpose clearly established. They accordingly passed judgment in favor of Plaintiff assessing Defendant with all costs.

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5. In the Special Appeal application it is contended that the Lower Court's appreciation of the evidence respecting the non-payment of the boat hire was incorrect, and that, admitting Plaintiff's statement on that point to be true, the Principal Sudder Ameen Appalaya, and not the Special Appellant, was the party who should have been sued.

6. The Court of Suder Udalut consider that a Special Appeal should be admitted in this case, inasmuch as it was requisite that Appalaya, the late Principal Sudder Ameen, should have been made the principal Defendant in the Suit, under the rule that, "where a contract is entered into by an Agent in his own name, but really on behalf of another person, "and a Suit is instituted respecting that contract, the principal must be "a party to the record." They accordingly resolve to admit a Special Appeal, and to send the Suit back for amendment and decision *de novo* by the Sudder Ameen Moofty.

No. 25 of 1852.

Decree dated 1st April 1852. *Page* 27 *M. V.*

8. But the Subordinate Judge, in his Decree, has not entered into any examination of the evidence, but contented himself with remarking that the plea was "a clumsy ruse often adopted by native litigants "and happily seldom successful. A ruse which in this case bears the "stamp of falsehood on the face of it."

9. But this cannot be admitted. The Subordinate Judge has to deal with the evidence before him and not with general practices; and if he rejects the Plaintiff's evidence on this point he must give his reasons for so doing.

No. 28 of 1850.

Decree dated 15th April 1852. *Page* 31 *M. V.*

22. The Court of Sudder Udalut would point out that a party is not allowed to plead as an excuse for neglecting to file, or to obtain, evidence that the Court below did not specially call for it, provided that Court had fixed the issues, * * * under which the evidence might with propriety have been tendered by the party himself.

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No. 30 of 1851.

Decree dated 22nd April 1852. *Page* 38 *M. V.*

1. The Original Suit was instituted for the recovery of Rupees 20-1-6, arrears of Swatuntrums for the 7 years (viz. from Fusly 1250 to Fusly 1257) during which the Defendants have cultivated, as Payakarree Ryots, certain lands in the Village of Vellyoor, of the whole Meerassy of which the Plaintiff holds a fourth share.

3. The Sudder Ameen dismissed the Plaintiff's claim with costs, on the ground that the land in question was immemorial waste land, common to all the share-holders of the Meerass; and that inasmuch as the Plaintiff was only one of the four shareholders, and, as he had not proved that the land referred to belonged to Plaintiff's own particular share, that he was therefore not entitled singly to prosecute a claim for Swatuntrums, that the Defendants held the land from the Circar and not from the Meerassidars, and that the Plaintiff had failed to show that, in any single similar instance, the cultivating Ryot had paid Swatuntrums.

4. The Plaintiff dissatisfied with this Decree appealed to the Civil Judge, presenting at the same time two documents, viz., a Takeed issued by the Collector of Chingleput on the 14th August 1849, and a Hookoomnamah issued by the same Officer, in September 1849, which had for their object to show that the Meerassidars were entitled to demand Coopputtum from those who might cultivate the waste lands.

5. These two documents were admitted and filed by the Civil Judge, who, after an attentive consideration of the record, confirmed the Decree of the Sudder Ameen.

6. The Civil Judge observed that the question whether Meerassidars had a right, or not, to levy Swatuntrums from Payakarries, who do not hold from them, but who have at their own expense brought immemorial waste land into cultivation under cowles granted by the Circar, had been frequently decided by that Zillah Court in the negative, to the justice and correctness of which opinion the present Zillah Judge fully assented; that the Meerassidars have prescriptive rights, as limited by those of the Government, and they have also duties; that it is their duty to arrange for the lands of the village being fully cultivated; that when they do so

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they can claim the customary Swatuntrums ; but when they fail in doing so, and the Circar exercises its right of granting cowles, they can have no right to claim any perquisites from lands which have been rendered productive by the labor and at the expense of others, without their intervention. With respect to the two further documents filed in the Appeal, the Zillah Judge observed that the Takeed contained nothing relevant to the point, but that the Hookoomnamah issued by the Collector in September 1849 appeared to contemplate that future cowles should contain some stipulation in regard to Swatuntrums, when of course the terms of such agreements would be fully enforced by the Court, but that, as the Defendants had not in the present instance bound themselves by agreement to pay Swatuntrums, the Plaintiff could not levy such exactions from the cowledars.

7. In his application for the admission of a Special Appeal, the Plaintiff urged that it was contrary to local usage, also to the Swatuntra Dittum sanctioned by Government, and to the rules for granting waste lands prescribed by the Board of Revenue and by the orders of the Court of Directors, to declare that he (Plaintiff) was not entitled to Swatuntrums for the waste land refered to.

8. The Court of Sudder Udalut admitted the Special Appeal, because the question "whether Meerassidars have the right, or not, to levy "Swatuntrums from Payakarries, who do not hold from them, but under "cowles granted by the Circar, was an important one, and one which had "not as yet been decided by the Court of Sudder Udalut."

9. It is observed that the land referred to is described as "immemorial waste land," which the Meerassidars never attempted to cultivate themselves, nor endeavoured to obtain others to do so; and, when the Circar issued a proclamation inviting parties to clear the land, never expressed a wish to undertake either of those obligations themselves.

10. The Government were therefore quite competent to seek for cultivators by whom to secure a Revenue from the land, which otherwise would have remained wholly unoccupied. But whether the Meerassidars of the Village, who, by reason of their omission or refusal to cultivate the land themselves, have no doubt forfeited their right to the Coodeewarum, or cultivator's share (for that can be claimed only by the actual cultivator, who has bestowed upon the land the benefit of his stock

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and labor) have likewise forfeited their right to the peculiar privileges called Swatuntrums, which are incidental to and evidence of Meerrassee property in land, is a separate and distinct question, which must be decided according to the immemorial usages and customs of the Country.

11. And, inasmuch as the Civil Judge of Chingleput, in the Decree now complained of, has determined this latter question in the affirmative, without any evidence having been taken to the custom and usage of the country in this respect, and without all the Meerassidars interested in the matter being before the Court, (and the Court of Sudder Udalut will show in a subsequent part of this Decree that the Plaintiff himself, being only one of a community of Meerassidars, was not competent individually to raise the question, or to originate such a claim as the present,) the Court of Sudder Udalut resolve to cancel so much of the Decree of the Lower Court as contains an extra judicial opinion on this point.

12. And for the same reasons, the Judges now deciding this Appeal, consider it to be their duty to amend the certificate under which this Special Appeal has been admitted, and to restrict the question now to be decided to the case of the individual Meerassidar present before the Court. To determine the *general* question in the absence of the Government, and of all the parties interested in the village, might affect the rights of the Meerassidars, or the interests of the Government, who have not had an opportunity offered them of defending or supporting this claim.

13. To confine therefore the question to the Plaintiff now before the Court;—it is observed that the land referred to in this Suit is described as "immemorial waste land," attached to a Meerassy village. Such land, when not specially divided (which has not been shown to be the case in the present instance) is property common to all the shareholders. The Plaintiff being only one of those shareholders, or Meerassidars, could not come forward with an individual claim for the Swatantrums on any given portion of that land, because no district portion of the land, forming the common property, is given to any individual shareholder, but the privileges, whatever they may be, are enjoyed in common with the other shareholders.

14. Now the Plaintiff (Special Appellant) has slumbered on the rights, which he now asserts, for the period of 7 years, and the other

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shareholders do not appear to have come forward at all with any claim on this account; and therefore the Sudder Ameen, who tried the Suit in original, very properly, in the opinion of the Sudder Udalut, took exception to the Plaintiff's Suit on the ground that he was not competent singly to prosecute such a claim.

15. And, the conduct of the Special Appellant has been quite inconsistent with the claim urged by him in the present Suit.

16. It is observed from the pleadings that this Special Appellant is said to be himself a holder of "immemorial waste land" under a cowle granted by the Circar, and that, when sued by another Meerassidar for the payment of Swatuntrums, he resisted that claim on the precise grounds which he now considers no valid excuse for the refusal of the Defendants to pay the present demand.

17. The Special Appellant has urged that, in the instance he referred to, he was himself one of the Meerassidars of the village to which the said waste land was attached; but that fact, even if true, would not alter the question of the Special Appellant's liability, because the waste land attached to a Meerassy village, which has not been specially divided, or any part of it given in maunium, is property common to all the shareholders, and therefore the Special Appellant could not claim the right of accepting a cowle from Government for the cultivation of any given portion of it, without assigning to the other shareholders their proportion of the Swatantrums, if any are exigible under such circumstances.

18. The Court of Sudder Udalut resolve therefere to confirm so much of the Decree of the Civil Court of Chingleput as rejects the Plaintiff's undivided claim to Rupees 20-1-6, due as arrears of Swatantrums; and the Court of Sudder Udalut, dismissing this Appeal adjudge the Special Appellant to pay all costs of it.

No. 29 of 1851.

Decree dated 22nd April 1852. *Page* 42 *M. V.*

1. The Original Suit was instituted by the Special Appellant for the recovery of Rupees 12-10-0, arrears of Swatuntrums alleged to be due by the Defendant for the 7 years (from Fusly 1250 to 1257) during which he had cultivated, as a Payakarree Ryot certain lands in the village of Vellyoor, of the whole Meerassy of which the Plaintiff holds a fourth share.

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8. The Court of Sudder Udalut, in their Decree passed under this date in Appeal No. 30 of 1851, which involves a claim on the part of this Special Appellant similar in every respect to the present, have fully recorded the grounds on which they consider it their duty to amend the certificate on which this Special Appeal was admitted, and to restrict the question to the case of the individual Meerassidar (Plaintiff) now before the Court, and it may be sufficient therefore in disposing of this Appeal briefly to recapitulate them.

9. The grounds therefore for restricting the question to the case of the Plaintiff before the Court, are that the rights or privileges claimed in this Suit having reference to land common as respects those rights to all the shareholders of the Meerass, the Plaintiff being only one of those shareholders, or Meerassidars, is not competent individually to come forward and prosecute a claim such as the present;—further, that for the Court of Sudder Udalut to determine a general question arising out of a Suit filed under such circumstances would be improper, and might prejudice the rights of the other Meerassidars, or of the Government, who have not had an opportunity given them of being heard in their defence.

10. Confining therefore the question to the case of the Plaintiff now before the Court, the Judges are of opinion that this person, being only one of a community of Meerassidars, is not competent individually to come forward and prosecute a claim for Swatuntrums on land, of the nature referred to above. The right to which privileges, (if any are exigible under the circumstances,) is enjoyed in common by all the shareholders.

No. 38 of 1852.

Decree dated 30th April 1852. *Page* 48 *M. V.*

15. It has been on more than one occasion ruled by this Court, conformably to Hindoo law and local usage, that the property belonging to a Tarwaad is answerable for debts contracted by the Karnaven, or managing member, unless it can be clearly and satisfactorily proved that they were not contracted for the benefit of the Tarwaad.

16. Also, that the formal consent, or signature, of the other members of the family is not necessary to render a Bond or other Document

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executed by the said Karnaven valid and binding on them, if a *boná fide* transaction, done with their knowledge, or consent, or for their behoof.

No. 14 of 1851.

Decree dated 30th April 1852. *Page* 51 *M. V.*

6. Respondent, though duly served with a notice, has allowed the Appeal to be tried exparte against him, and the Court of Sudder Udalut, after an attentive consideration of the merits of the Suit, can perceive no ground for interfering with the judgment appealed from. Appellant is now anxious to adduce evidence in support of his respective averments; but, as he has failed to account for his default before the Court of Requests, he cannot be allowed to produce testimony, in Appeal, that should have been forthcoming at an earlier period.

No. 74 of 1851.

Decree dated 30th April 1852. *Page* 60 *M. V.*

1. The Original Suit was instituted by the Plaintiff (Special Respondent) for the recovery of a house valued at Rupees 150, and for the emoluments of a religious office valued at Rupees 9-6-0.

2. It was set forth in the plaint that Plaintiff was the grandson of the eldest daughter of one Parwaty Ummal, who left by will the property in question to the eldest son, Soobramaneyen, of her 2nd daughter. Upon the death of that individual the property fell to his younger brother Punganadien, who died about 1846, and by will left it to his foster son, the 4th Defendant (4th Special Appellant.) It was also stated that the sons of the younger daughter enjoyed the property by the sufferance of Plaintiff's father (deceased) who was equally entitled to a share; and it was urged that the will was invalid; that the 4th Defendant, as a foster son, was not competent to perform the funeral rites of the deceased testator; and that Plaintiff was the legal heir. The 4th Defendant urged that, under a Decree No. 287 of 1818, in which a relative of the husband of Parwaty Ummal sued her for a moiety of her husband's estate, her right to make over the property to her grandson,

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Soobramaneyen, was recognized; that consequently Plaintiff had nothing to do with it, and Punganadien was at liberty to dispose of it as he pleased. It was also denied that the two grandsons had enjoyed the property by permission of Plaintiff's father. The 1st Defendant concurred in this answer, and the other Defendants allowed judgment to go by default.

3. The Moonsiff of Paupanassem dismissed Plaintiff's claim, because it was clear that neither he, nor his father, nor grandfather, had ever participated in the estate, while, on the other hand, the Decree (exhibit No. 1) in $\frac{287}{1818}$ distinctly admitted Parwaty Ummal's right to convey it to her grandson Soobramaneyen, in conformity with which she, on 18th March 1819, executed a will (exhibit No. 2) in his favor. The Moonsiff then observed that the Defendants had proved both by documentary and oral evidence, that Soobramaneyen, and after him, his brother Punganadien, had enjoyed the property at issue without let or hindrance, and that finally Punganadien had by a will (exhibit No. 11) left it to 4th Defendant, who performed his funeral ceremonies, to which the Moonsiff considered no legal obstacle existed.

4. The Civil Judge reversed the Decree of the Moonsiff, observing that there was no doubt about the authenticity of the two wills, (exhibits Nos. 2 and 11) that no opposition had been made by Plaintiff, or his father, to the disposition of her property made by Parwaty Ummal; that the families of the two daughters of the latter had nothing in common, and were to all intents and purposes divided; that consequently, had Punganadien disposed of his property without reference to the performance of his funeral rites, the disposition might have been admitted; as it was, however, the legatee under a Futwa of the Pundits of the Sudder Udalut was incompetent to perform the rites of Punganadien, which it was the duty of Plaintiff, as the son of the cousin german of the deceased, to celebrate.

5. The Civil Judge further remarked that it appeared that, before the Decree in $\frac{287}{1818}$, which admitted Parwaty Ummal's right to convey the whole of the property to her grandson Soobramaneyen, was passed, a notice was issued calling upon her co-parceners to appear and state their claims, but that no claimant came forward; and that there was not the slightest allusion in the record of that Suit to any thing that

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would indicate Parwaty Ummal to have been of unsound mind when the will, which was drawn up immediately after the Decree in question had been passed, was executed by her.

6. In the Special Appeal petition preferred by the Defendants, four grounds were advanced by them, and it was admitted by the Sudder Udalut, to try the validity of the 1st and 4th viz. "that the Civil Judge's "Decree is opposed to Hindoo law in making the law applicable to des-"cendants in the male line to apply to those of the female line;" and, "that "it is opposed to Hindoo law as it vests the right of performing obsequies "in a party of a different gotrum, to which he is by no means entitled."

8. The matter in issue hinging entirely on a question of Hindoo law, the Court of Sudder Udalut have submitted the same for the exposition of their Law Officers, who in their reply state as follows:—"As the "Hindoo law does not recognize a 'foster son,' it was not legal that F "(Punganadien)should constitute H (4th Special Appellant) as his 'foster "son' and make a will accordingly; nor is it consistent with the shaster "that H should perform F's funeral rites. Such performance on his part "is legally ineffectual, and cannot entitle him to the property of F "which must go to F's *sapinda* kinsmen, &c., who are included in the "order of succession to the property of a person who dies leaving no "male offspring. G (Special Respondent) though the son of A's (Par-"vaty Ummal's) eldest daughter's son, is not on that score entitled to "claim or succeed to the property in dispute."

9. The Court of Sudder Udalut, seeing no reason to question the correctness of the foregoing exposition of the Law, which distinctly shows that Special Respondent is not entitled to the property claimed proceed to reverse the Decree of the Civil Judge, and dismiss the claim set up by Special Respondent.

No. 84 of 1851.

Decree dated 30th June 1852. *Page* 71 *M. V.*

1. The Original Suit was instituted by Plaintiff (Special Respondent) for the recovery of certain lands yielding Rupees 12-8-0 annually.

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6. The judgment of the District Moonsiff, who first tried the Original Suit was in favor of the Plaintiff, against which judgment the heirs of the 1st Defendant appealed, and the late Principal Sudder Ameen, having gone into the case, remanded it to the Court of Original Jurisdiction for re-investigation.

7. The case was accordingly replaced on the file, and a Decree passed by the District Moonsiff Adaseyam Pillay confirming that of his predecessor, on the ground that the Document filed by the Plaintiff fully proved that the land belonged to her family, while neither the 1st Defendant nor his heirs had succeeded in establishing any point mooted in their defence.

8. Against this Decree the Defendant's 3rd son (present Special Appellant) appealed, and the Principal Sudder Ameen, concurring in the opinion expressed by the Lower Court in regard to the validity of the Plaintiff's claim, dismissed the Appeal, at the same time remarking that as the Plaintiff had sufficiently proved that she had repeatedly complained to the authorities of the Defendant's usurpation of her lands, the Suit, which was instituted within 12 years after the Sub-Collector had referred the Plaintiff to the Civil Courts for redress, was not barred by the Statute of Limitations.

9. A Special Appeal was admitted by the Court of Sudder Udalut in order to bring under consideration, whether or not the action was barred by the Law of Limitation.

10. In his answer, Special Respondent urges that the 1st Defendant having after the demise of Ramasawmy Sastry (3rd Defendant's husband) neglected to pay the rent to Plaintiff a complaint was in 1829 preferred to the Talook Cutcherry, and a final Decision only passed in 1833, when 1st Defendant pacified her promising to make over the land in question and which point had been proved; and that, 1st Defandant having failed to relinquish the contested land, the Original Suit was instituted in 1845, and as repeated demands were made upon 1st Defendant for the restoration of the property the Law of Limitation cannot apply in this case.

11. In the force of this reasoning the Court of Sudder Udalut are unable to concur, as neither in the Original nor the Appeal Decree has

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any mention been made of this asserted proof, the chief stress in the former being laid upon the documentary evidence adduced by Plaintiff as to the land belonging to her family, while neither the 1st Defendant nor his heirs had succeeded in establishing any point mooted in their defence. In the Appeal Decree, on the contrary, the Principal Sudder Ameen adverts to the complaints made to the Revenue authorities, and considers that as the action was brought within 12 years from the date of the order of the 30th September 1833, so the Statute of Limitation is inapplicable to the matter at issue.

12. The Court of Sudder Udalut have however no hesitation in declaring that the claim thus made was not preferred to a Court of competent Jurisdiction; and that, as the cause of action is shown to have arisen in 1829 at the latest, the Suit must be pronounced barred by the Law of Limitation. The disputed land is admitted to have been in the possession of Special Appellant's family since 1804, and the said Ramasawmy Sastry is also allowed to have demised in 1820, whilst all proof is wanting of Plaintiff's claim having been acknowledged by 1st Defendant within the period prescribed by Law. None of the exceptions therefore specified in Clause 4th, Section XVIII, Regulation II of 1802 applying to this case, the Court of Sudder Udalut proceed to reverse the Decree appealed from, and dismissing the original claim, to tax Special Respondent with all the costs.

No. 12 of 1852.

Decree dated 30th June 1852. *Page* 76 *M. V.*

1. The Plaintiff, a pleader in the Civil Court of Chicacole, stated that he drew up the statement and certificate specified in Section V, Regulation VII of 1818 for the brother of the Defendant who was eventually allowed to sue as a pauper, for the recovery of Rupees 11,533-4-0 in Original Suit No. 113 of 1845. The Suit was compromised before the pleadings closed by the payment to the Defendant's brother of 3,000 Rupees, upon which the Plaintiff applied to the Court for the collection of his fees from the Defendants, but was referred by the Civil *Judge to a Civil Suit for their recovery, and he consequently sued for Rupees 95-2-8¼ of the prescribed fee upon the amount originally claimed.

* 26th June 1848.

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2. The Defendant denied that the Plaintiff had drawn up the statement and alleged that he had not been promised any specific sum for his opinion, that the Plaintiff took no part in the examination of the witnesses called in support of the objections to the plea of poverty and was not furnished with a Vakalutnamah.

3. In reply the Plaintiff urged that it was not necessary to give to a pleader engaged in a pauper Suit a Vakalutnamah.

4. The Suit appears to have been thrice sent back for re-trial.

5. In his final Decree the Moofty Sudder Ameen was of opinion that it had not been proved that any agreement for the payment of fees to the Plaintiff had been made, the evidence to that point being discrepant. He consequently did not think it necessary to take the evidence for the Defendants into consideration, and observing that it was impossible that an agreement for the payment of Vakeel's fees could have been made before the passing of Act I of 1846, dismissed the Suit.

6. The Plaintiff appealed, alleging amongst other things that the Moofty Sudder Ameen had refused to take evidence to the Defendant having offered him 70 Rupees.

7. The Civil Judge passed judgment in the following terms.

" Having gone over this record, it appears the promise was made, and "the whole case rests on it, and the witnesses who gave their depositions "before the Sudder Ameen, say the Respondent did promise him (the Ap- "pellant) fees, but none of them have stated what the sum was, which "was fixed as the fees, nor do they know. The Court having as requested "by the Appellant had depositions taken from the Government Vakeel, "and Narsimmacharloo, another regular pleader of the Court, who were "named before the Sudder Ameen has not a doubt that the statement of "these persons is correct and they both confirm the statement of the Ap- "pellant that 70 Rupees and odd was offered by the Respondents, and the "Government Vakeel distinctly says 74 Rupees was the sum offered. "Therefore the Lower Court's Decree is reversed, and the Respondents will "pay the Appellant 74 Rupees with costs of Suit Original and Appeal."

8. It was urged in the Special Appeal petition that the Plaintiff has not proved that the statement was drawn up by him.

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That the Civil Judge has grounded his Decree upon an offer of compromise alleged to have been made after the Suit was filed.

That as the Plaintiff did not hold a Vakalutnamah he is not entitled to the fee prescribed by the Section XXV, Regulation XIV of 1816, and can only claim for his opinion that specified in Section XX of that enactment.

That no private arrangement could be made between a party and a Vakeel prior to the enactment of Act I of 1846, and

That the Plaintiff's evidence is contradictory and untrustworthy.

9. A Special Appeal was admitted in order to try the following issues.

1st. Whether the Civil Judge was justified in basing his decision on a promise made subsequent to the filing of the action.

2ndly. Whether the execution by a pauper Plaintiff to his Vakeel of a Vakalutnamah is necessary under the Regulations.

3rdly. Whether the absence of a Vakalutnamah disentitles the Vakeel to claim the fees specified under Section XXV, Regulation XIV of 1816.

4thly. Whether the Vakeel in the present case is entitled to the fees specified in Section XXV or to those in Section XX, Regulation XIV of 1816.

5thly. Whether a private arrangement could be made between a party and his Vakeel prior to the enactment of Act I of 1846, and

6thly. Whether the Civil Judge was correct in referring the Plaintiff to a Suit to obtain his fees, instead of entering the same in the usual way under the head of costs and collecting them by the Court's process.

11. As respects the 1st point. The Court of Sudder Udalut consider that although a promise of the kind would not prove so wholly inoperative as has been ruled when offered as a plea to suspend the operation of the rule of limitation, it would be establishing a most dangerous precedent to uphold a Decree based entirely, as has been done in the present instance, upon the alleged offer, which could only be of avail as corroborative testimony.

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12. On the second point, the Court of Sudder Udalut are decidedly of opinion that the Vakalutnamah is necessary under the Regulations, and so it has been ruled by the Sudder Udalut both of Calcutta and the North Western Provinces, and further that the Vakalutnamah must bear the usual stamp. The Court of Sudder Udalut regard this construction as fully borne out by Section XXIV. Regulation XIV of 1816, which simply declares that the rules prescribed in the preceding Section are not intended to be applicable to the fees of Vakeels employed on the part of paupers &c. but is silent as to no necessity existing for the production of Vakalutnamah.

13. In regard to the 3rd point the Court of Sudder Udalut hold the absence of a Vakalutnamah to be fatal to Special Respondent's claim, but even had it been otherwise, they do not see how he could demand as a right the fees specified under Section XXV the preceding one declaring that "no previous deposit or fees shall be demanded on account of the Vakeel's fees, but the amount of the fee which may ultimately be awarded by the Court under Section XXXV shall be levied in the manner prescribed for the execution of Decrees, in all instances in which the interposition of the authority of the Court may be requisite for the purpose of realizing such fee."

14. With reference to the fourth point, the Court of Sudder Udalut do not see how they could adjudge Special Respondent any higher remuneration than that specified in Section XX, it appearing to them that the proof is wanting of Special Respondent having done more than furnish the opinion required by Regulation VII of 1818, and further that the requirements of the Regulations not having been conformed to, even if his active co-operation had been fully established no Court would be justified in acceding to his demand.

15. As respects the fifth point the Court of Sudder Udalut have no hesitation in deciding in the negative, though they are aware that the practice both in Bengal and the North Western Provinces, quoted by Marshman and Macpherson is against them. The opinions of the Judges however in both those Courts would seem to have been grounded from the provisions of Clause 5th, Section II, Regulation XII of 1833 corresponding in a great measure with Section VII, Act I of 1846; whilst nothing could be more clear or conclusive to the contrary than Section

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XXIII, Regulation XIV of 1816, which strictly prohibited a Vakeel from doing any act in a Suit until the required deposit was made " except in the case of paupers, or in other cases, specially provided for by the Regulations," for which Section XXXV provides the remedy.

16. And on the subject of the sixth point the Court of Sudder Udalut hold that the Civil Judge was not correct in referring Special Respondent to a Suit to obtain his fees, but that he should have acted agreeably to the provisions of Section XXXV, Regulation XIV of 1816, and awarded to Special Respondent such fee as he might have considered to be a reasonable compensation for the duty performed by him, taking care that the Regulations were strictly acted up to.

17. The Court of Sudder Udalut consequently now modify the Civil Judge's Decree to the above effect, awarding to Special Respondent the remuneration allowed by Section XX, Regulation XIV of 1816, but under all the circumstances of the case they consider it but just and fair that each party should be made to bear his own costs in all three Courts.

No. 20 OF 1851.

DECREE DATED 30TH AUGUST 1852. *Page* 96 *M. V.*

1. The Suit was instituted by the Plaintiff to recover possession from the Defendant, as his adoptive mother, of the Pollam of Naragulloo in the District of North Arcot, yieding annually Rupees 16,490-2-1 with other property valued at Rupees 80,118-10-9, in which sum is included the net revenue of the Pollam, and proceeds of gardens and other lands for seven years, or from the date of the late Poligar's death to the institution of the Suit.

2. The plaint set forth that in the year 1837, the late Poligar, being on his death bed, and having no male issue, resolved that his younger brother the Plaintiff then 18 years old, should be adopted as his son, made a will to that effect, and addressed Arzees to the Collector and Government requesting that his wishes might be carried into effect; that his wife, the Defendant, accordingly adopted Plaintiff as her son, and he performed all the offices usual on such occasion at the death

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bed, and at the funeral of the late Poligar; that the Defendant addressed an Arzee (Document No. 45) to the Collector, reporting the death of the Poligar, and requesting that the adoption, in conformity to the will, might be confirmed; that the Collector sent for Plaintiff and directed that Defendant should for the present manage the estate; that Defendant found excuses for retaining the management, and in April 1838 applied to the Collector for permission to adopt whom she might prefer, which request was rejected, and Plaintiff having applied to be put in possession, obtained permission from Government to assert his right by a Civil Suit, by order signed by the Secretary to Government, as required by Section II, Regulation IV of 1831.

3. The Defendant answered that the value of the property left by her deceased husband was greatly overestimated in the plaint; that it was not true that her husband wished the Plaintiff to be adopted, or that she had adopted him; that the Plaintiff was not capable of being adopted by her, inasmuch, as he had performed the funeral ceremonious of his own parents, and was the uterine brother of her husband, and is also older than herself; that her husband, having died without male issue, she was entitled to succeed as his heir, and that the will only stated that the adoption was to take place, after her husband's demise, and that until it was made, and a renewal of the grant in the name of the adopted son was obtained, she should manage the estate, and that the Plaintiff did not attend at her husband's funeral rites as a son, but only by her appointment.

4. Reply and rejoinder were filed by the parties respectively.

5. The various questions of Hindoo Law raised in this Suit having been referred, firstly, to the Pundits of the Court of Sudder Udalut, and secondly, in consequence of their differing, to the Pundit of the Calcutta Sudder Dewany Udalut, the Junior Pundit of this Court and the Pundit of the Calcutta Court, in opposition to the opinion of the Senior Pundit, were agreed, that adoption by a brother is not allowed by Hindoo Law, and that a boy whose parents are dead, cannot be given in adoption by an elder brother, or any one else.

6. The Civil Judge observed in his Decree, that so much difference of opinion could only be accounted for, by *supposing* that the practices

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must vary in different families and localities; that he could find nothing decidedly to the point, in any of the compilations of Hindoo Law, but that it seemed to be in some measure explained by the remark in Sir Thomas Strange's page 75, elements of Hindoo Law, in which it is said, with regard to certain prohibitions, " where they most strictly apply, " they are directory only; and an adoption" * * " however blameable in " the giver, would nevertheless, to every legal purpose, be good, accord- " ing to the maxim of the Civil Law " * * Factum valet, quod fieri non " debuit;" that he understood that similar adoptions, to which, such objections as those above noticed might have been raised, have passed unquestioned, and that under all the circumstances, if the alleged adoption could be proved to have really taken place, and to be in other respects formal and regular, he was of opinion it could not be set aside on any of the grounds referred to; but with reference to the facts of the case, he considered it to be very doubtful, whether the late Zemindar ever executed the will attributed to him; and was of opinion that whether the will be admitted or not, no regular adoption could be considered to have taken place at all. The Civil Judge adverted particularly to the circumstances that while the original will is not forthcoming, the signature of the late Zemindar to the Arzee communicating to the Collector the execution of the will, does not correspond with his other and authentic signatures; that three of Plaintiff's witnesses admitted they did not see the will signed; that the alleged adoption is irreconcileable with the will, and was never in any way admitted by the Defendant, and that the words " adopted son" in one of her Arzees to the Collector, is an evident interpolation, after the Arzee was written. He also adverted to the circumstance that the Collector, Mr. Ogilvie, who made an enquiry in 1841 regarding the will did not appear to consider that any adoption had been made, or to have asked any question about it, but on the contrary in his orders, repeated by the Plaintiff, and he therefore dismissed the Plaintiff's claim with costs.

7. The Appellant in his Appeal Petition contends, that the facts of the execution of the will, and of the adoption in pursuance of it, were fully and clearly proved; that the Civil Judge has doubted and discredited the evidence adduced in regard to these points, without assigning any sufficient reasons for so rejecting it, and that the circumstance of the

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adoption having been made, while the late Zemindar was yet alive, although the authority given was to adopt after his death is immaterial. He denies the fact, of there being any interpolation in the original of the Arzee (Document No. 45), argues that as it was in the Collector's keeping, no interpolation could have been made, after it was written. He contends that it is clear from the documents Nos. 43 and 44, that the late Zemindar, to the utmost of his power, willed his whole property to the Plaintiff (Appellant) and that as Defendant by her Arzee admitted and confirmed such will, she is barred from setting up any personal claim as heir, and states that although the Collector Mr. Ogilvie in 1841, made no inquiry regarding any adoption, which was not required, until the validity of the authority to adopt was established, yet there was an enquiry as to the adoption made in 1841, by the Collector, Mr. Goldingham, who in his report to the Board of Revenue found, that this adoption had in fact taken place; and Appellant prays that such report may now be called for, from the Board of Revenue, and considered, the Civil Judge not having complied with a request to that effect. In Supplemental Petition the Appellant argued at considerable length, in support of the legality of the alleged adoption, supposing it to be proved to have taken place; and finally presented a motion stating, that supposing this court should be of opinion, that the Civil Judge was right in holding that no adoption had taken place, yet that the Respondent, the widow, was bound under Hindoo Law to carry out the admitted authority and agreement executed by her husband with her consent, but having illegally refused to do so, Appellant was, and is entitled to the specific performance thereof, and requesting that a reference might be made to the Pundits of the Court with a view to ascertain the exact bearing of the Law on the subject. It may here be observed that questions having been accordingly put to the Pundits, their answers were to the effect, that a widow is bound to carry out the intentions of her husband by adopting the person named by him; and failing to do so, and thus depriving him of the religious advantages derivable from a son, she would become unfit, as a disobedient wife, to succeed to her husband's property; that the ruling power might coerce her, by confiscating the estate, and making it over to the next heirs, on failure of whom it would escheat to the State; but that, under any circum-

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stances, while she persisted in not adopting, the adoptive party named by her husband could in no way claim as heir.

8. The Respondent in her answer, argues that the Civil Judge, in admitting that the alleged adoption, if proved, would be valid, has by way of solving the difficulty arising from the difference of opinion between the Pundits of the Court, arbitrarily, and incorrectly assumed, that the practice must vary in different localities and families, without any evidence whatever before him, of such varying local practice; whereas the question at issue, involved fundamental principles of Hindoo Law, which could not be disturbed or unsettled, even had there been evidence of varying local practice. She argues that the opinion of the majority of the Pundits was correct, that the adoption of a brother, is altogether repugnant to the Hindoo view of what forms fit subjects for that act; and that, although the Law Books pronounce, that amongst Soodras, the affiliation of a daughter's son, and a sister's son, is lawful, the very particularity in setting this out, without the slightest allusion even to the nearer connexion of a brother, suffices to evidence in itself, that the general restriction was here not waived; and that in regard to the giving by an elder brother of a younger, in adoption, although there are innumerable passages regarding the gift by a father and a mother, not a single text of Hindoo Law is any where to be found, which vests an elder brother with such authority, and the differing Pundit himself, did not pretend that there is, but only justified his opinion, by the strained inference, that because the Hindoo Law regards the relation of an elder brother to a younger one, as that of father to son, therefore, he has the power, which view is not sustainable; because the relation spoken of is that of domestic deference and dependance, and then, only so long as they choose to remain united; that the Hindoo Law carefully defines the rights of property to be enjoyed by an elder brother, that he shall have no power over what pertains to the rest; that if it had been designed to confer upon an elder brother, that most important power under Hindoo Law, of alienating a person, and here a younger brother, from his natural relation to his father, its bestowal, or the fact of its being inherent in that elder brother's possession, would have been clearly stated, and the omission of any mention of it, is fatal to the pretension of its existence. The answer in other respects supports the Decree of the Lower Court.

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9. The Court of Sudder Udalut having attentively considered the whole record of this case, and heard the Pleaders of the parties orally, proceed to decree. The points for consideration appear to be,—1st, whether the alleged adoption was authorized by the late Zemindar; 2ndly, whether it really took place in pursuance of such authority; and 3rdly, whether such an adoption, if made, would be valid and good; for the plea put forth by Appellant in Appeal that the Document No. 43, is of the nature of a will, and conveys the estate of the deceased Zemindar to the Appellant as Legatee, and the similar additional plea urged orally by his Pleader, that it contemplates a gift to the Appellant, and he is entitled as Donee, appear equally unsustainable. The Deed in question is simply one authorizing the adoption of the Plaintiff by the Defendant, and it conveys nothing exclusive of such adoption. After full consideration of the nature of the evidence, and the various bearings of the case, the Court of Sudder Udalut consider, that although there is reason to doubt, whether at the time of preparation of the Deed of authority No. 43, the late Zemindar, who died the following day, after suffering for three months from dysentry, was in such a state of mental and bodily sanity, as to be legally competent to execute such a deed, or was even fully conscious of what was done by those about him, yet as the Defendant subsequently repeatedly acknowledged that she had received such authority from him, such deliberate acknowledgment must be held to be binding on her. The Court of Sudder Udalut, however consider that there is no credible evidence of the alleged adoption. It is true some nine persons, including the Plaintiff's elder brother, and the latter's wife, deposed with some discrepancies and contradictions that the evening before the Zemindar's death, the Defendant asked the Plaintiff's elder brother, in a room in the palace, to give him to her in adoption; that he agreed, and said he gave him—and that she said she received him; and some Turmeric water being brought she drank it: such brief evidence is easily got up and does not admit of much cross-questioning to shake it, and when such evidence alone is brought, unsupported, in proof of a claim to a large estate, it must naturally be viewed with much suspicion. Sir Thomas Strange, and other writers on Hindoo Law, while stating that in the case of Soodras, "giving and receiving" is sufficient to constitute adoption; agree that all the other usual ceremonies, involv-

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ing much publicity, are desirable, as furnishing evidence, while also for the same end, it should be done with the cognizance of the ruling power. All these evidences are wanting in this case, and while the adoption is said to have been made hastily, and contrary to the authority given, there is no subsequent overt act proved. The Document No. 45, upon which the Plaintiff rests, contains an admission of the deed of authority to adopt, but nothing, which can in the slightest degree be constructed to amount to an admission of adoption, having taken place, even allowing the interpolated-words "Dutta Pootroodoo" to remain, it is merely an allusion to the Plaintiff as the adoptive son mentioned in the deed of authority No. 43; but these words were found, on inspection of the Original of Document No. 45, which was called for from the Collector's Office, to be clearly an interpolation; when made, of course cannot be known. The Documents Nos. 63, 81, 82, 83 and 84, filed by Defendant, are orders addressed to her by the Collector, dated from 11th November 1837 to 15th March 1838, requiring her to communicate her intentions in regard to the adoption of the Plaintiff or otherwise; and they show also, that the Defendant represented in her letters to the Collector, that she had not made up her mind, whether to adopt him or not, and that she wished to observe his disposition for some time longer, before making up her mind : No. 63 is an Original-Takeed under the Collector's official seal and signature. The others are authenticated copies from the Collector's Letter Book, the Originals sent to Defendant having been lost or mislaid by her, and they are considered equally admissible. These show that although the alleged adoption is said to have taken place on the 14th Septr. 1837, yet, from that time up to March 1838, nothing of the sort was known or heard of, and a public and official correspondence was going on with the Collector in regard to the question; whether the adoption would be made or not, but no word about its having been already made; all which must have been notorious and matter of common talk all over the District, and the Plaintiff who had attained the full age of 18 years, being little younger than the Defendant, is to be supposed to have remained quiet all the time, allowing the Defendant to usurp the management of the Zemindary, although the Plaintiff, if adopted, as he and his witnesses say, was the party who ought to have written to the Collector, and exercised all authority, being of competent age. The Court cannot, under these circumstances, give

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the slightest credit to the evidence of the witnesses brought to prove the adoption. The report of the Collector, Mr. Goldingham, to the Board of Revenue, the Court declined to call for, as requested, because no sufficient reason was assigned for the application, and the Court did not consider that any opinion expressed by the Collector on a summary enquiry regarding an occurrence said to have taken place 7 years previously, was admissible evidence, or could be any guide to the Court, which is bound to decide upon its own appreciation of the evidence before it. The facts of the case having been so disposed of, it appears desirable, though not absolutely necessary, to advert to the important legal points mooted apparently for the first time, viz. the competency of a Hindoo, to be received or given in adoption by a brother. It appears to the Court of Sudder Udalut that the Civil Judge had no grounds for the assumption made by him of varying local practice, and that the opinion of the majority of the Pundits was correct, and ought to have been followed, as it appears to be in accordance with all the received Authorities on Hindoo Law, and although the Appellant's Pleader has quoted almost all these Authorities, he has failed to show any passage which warrants in any way, the conclusion, that a brother might receive, or give a brother in adoption. The only precedent quoted is the case of Veerapermal Pillay in the Recorder's Court at Madras, at Page 127 of vol. I of Notes of Madras Cases, in which case a boy was given by his elder half brother; but the case was not analogous to this one, as the boy's mother was alive, and the opinion of the validity of the giving, was expressly stated to be founded on the presumed consent of the mother. To declare that an elder brother has the power to give his younger brother away in adoption, would be establishing a most dangerous precedent, which might obviously lead to much abuse, because such power, if it existed at all, must be inherent and absolute, and not one, the exercise of which might be sanctioned or annulled by the Courts, according to the view taken of its being beneficial or otherwise to the effect of it; and it fortunately does not appear, that the Hindoo law sanctions any such power. In a Bengal case quoted at Page 66, Vol. I of Macnaghten's Hindoo Law, the giving by a brother was declared invalid. In regard to adoption by a brother all the Authorities seem very clear that a brother cannot be received in adoption by a brother, see especially Sir Thomas Strange, Vol. I, Page 71, and Macnaghten's Hindoo Law, Vol. I, Page 67 &c.; but in the present case

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the fact of the deceased Zemindar having been himself adopted into another's family, and so lost his brotherhood to the Plaintiff, might make it questionable, whether the Law on that point is applicable to the present case.

10. For the above reasons the Court of Sudder Udalut resolve to confirm the decision of the Civil Judge, and to dismiss the Appeal. All costs in Original and Appeal Suits to be made good by the Plaintiff (Appellant.)

No. 23 of 1851.

Decree dated 16th September 1852. *Page* 111 *M. V.*

1. The Original Suit was brought for the recovery of the Zemindary of Torriore yielding an annual income of Rupees 34,000, and other real and personal property pertaining thereto, valued at Rupees 92,462-11-4.

2. It was stated in the plaint that Settecolum Prasunna Vencatachella Reddyar, late Zemindar of Torriore, who was childless, feeling his end approaching, directed his wife, the Defendant, to adopt a boy of his tribe, and executed a will to that effect on the 8th March 1835;—that on the same day, he, by an Arzee, addressed the Collector of the District, informing him of what he had done and died on the following day;—that in accordance with the deceased's instructions, the Plaintiff being at that time 13 years of age, was adopted in due form by the Defendant, with the consent of his parents and in presence of his relations as well as with the full knowledge of the public authorities.

3. That, subsequently, the adoption of Plaintiff having been reported to the Revenue Board, orders were issued by that authority, directing that the Estate should be placed under the management of the Defendant during his, the Plaintiff's, minority;—and that Defendant accordingly continued in possession thereof; that Plaintiff having subsequently learnt that the income of the estate was misappropriated by the Defendant, brought the same to the notice of the Revenue authorities;—and a disagreement having in consequence arisen, Plaintiff separated himself from the Defendant, and addressed an Arzee to the Collector requesting to be placed in possession of the Zemindary, but the Board of Revenue,

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to whom the matter was referred, decided that as the Estate had not been under the management of the Court of Wards, it would be necessary for him, Plaintiff, to have recourse to the Civil Courts for its recovery.

4. The Defendant in her answer asserted her claim to the Zemindary, and other property of her deceased husband as her own by inheritance from him, stating that at the time of his death she was his legal heir; that the Board of Revenue, after she had conformed to the will of her husband by adopting a son, directed the restoration of the Zemindary to her, and that she had held it without interruption from the 19th July 1836; and she contended that the objects of the adoption were to protect the interests of the Zemindary after her death, to continue the family of the Zemindar, and to ensure the continuance of the performance of ceremonies for the deceased, but that it was never contemplated that the adopted son should deprive her of her Estate.

5. It was further contended by the Defendant, that Plaintiff's claim to succeed to the Zemindary was barred under the Hindoo Law, by his non-performance of the funeral ceremonies of her deceased husband; by his disobedience to his parents; and by the fact that his father being of another tribe, the adoption of him was invalid, and finally she urged, that the charge of her having misappropriated the funds of the Estate was untrue, and that the valuation of the property, as stated in the Plaint, was greatly exaggerated.

6. A reply and rejoinder were filed by the parties in refutation of the objections put forth by them in the plaint and answer respectively.

7. The following points were declared by the Civil Judge to arise from a consideration of the Pleadings in this case, 1st, that the late Zemindar did direct the Defendant, his widow, to adopt a son; 2nd, that she did so adopt the Plaintiff; 3rd, that by such adoption, the Plaintiff became sole heir to the adoptive father, and that consequently the Defendant had no title to the Estate; 4th, that the adoption was such that the Defendant cannot now object to its validity; 5th, that the Plaintiff did not subsequently forfeit the inheritance.

8. On the first point the Civil Judge remarked that it might be suf-

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ficient to refer to the will of the husband of the Defendant, and the Arzees' addressed to the Collector by him and by the Defendant herself, and to the admitted fact that the Zemindary was withheld, until the Defendant conformed to that will; and with reference to the second point, he observed, that the adoption of the Plaintiff was established by the Defendant's own admission, and by the documents addressed by her to the Collector or otherwise addressed to her, or to the Tahsildar, and involving the necessity of her being made acquainted with the contents at the time; and in respect to the third point, the Civil Judge adverted to certain cases quoted in Strange, the Sudder Dewany Reports, and other works enunciating the principles of Hindoo Law, which, in his opinion, were clearly applicable to the case then under his consideration, and clearly refuted the Defendant's claim to set up her own right in opposition to that of the adopted Son.

9. The 4th and 5th points, the Civil Judge also decided against the Defendant, it being clear to his mind, that under the Hindoo Law, neither the age of the Plaintiff nor the fact of his belonging to a different gotrum, were sufficient to invalidate the adoption; and that the alleged acts of disobedience on his part were altogether insufficient to warrant his disinheritance.

10. Under this view of the case, the Acting Civil Judge proceeded to direct that the Plaintiff should be put in possession of all property claimed in the Defendant's possession, or within the buildings, called the palace, or otherwise pertaining to the Aramany, together with the Zemindary and all insignia and other property pertaining thereto, as claimed in the suit, and further to declare that no transfer whether by gift or otherwise, of any lands or other property of the Zemindar, made by the Defendant at any time, should be valid unless confirmed by the Plaintiff.

11. The Defendant was adjudged to bear all costs of the suit.

12. The Counsel for the Appellant in pleading the case before the Court, admitted that an adoption had taken place, and that a permission given to adopt was tantamount to a command. He gave up the point of disqualification of the Respondent on account of disobedience and non-performances of the funeral ceremonies of the deceased Zemindar. He limited the Appellant's case to two points, and maintained, first, that

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under the particular circumstances of the case, the adoption was invalid because the adopted son did not belong to the same "gotrum" as the Appellant and her deceased husband, there being relations of her husband alive and available; and, secondly, that a beneficial interest was conferred on the Appellant by the will of her deceased husband, in virtue of which the Appellant is entitled to a life interest in the Estate, or to a joint interest in it during her life time with the Respondent.

13. It was not admitted on the other side, that the Respondent did belong to another gotrum. The first question therefore for the Court to decide is, whether or not the Respondent belonged to the same gotrum; and if it be proved that he did not belong to the same gotrum, the second question will be, whether the adoption in this case is valid; and if it be decided to be valid, the last question will be, whether the Appellant is entitled to an award in her favour as sought for in appeal.

14. The witnesses for the Appellant depose, that the Respondent did not belong to the "gotrum" of the Appellant: none of the witnesses on the other side deposed that he did so; several of the witnesses deposed that he was of another tribe; others deposed they did not know; others deposed that being of the "Soodra" caste, he had no tribe at all. The Court have no difficulty therefore in deciding that the Respondent did not belong to the gotrum of the Appellant.

15. It is deposed to by the witnesses for the Appellant, that at the time of the adoption, there were other suitable children belonging to the "gotrum," and Dayadis (relations) of the Appellant: this fact is equally positively denied by the witnesses for the Respondent. Nearly all of the witnesses for the Appellant who deposed to there being other available children, deposed also that no adoption with proper ceremonies of the Respondent had taken place: this was proved to be false, and is now admitted to be so. The Court do not therefore consider their evidence as to there having been suitable children belonging to the Defendant's gotrum, worthy of credit. The only two witnesses who were questioned as to the genealogy of the boy, stated that they were ignorant of it; the admission of the Respondent's witnesses that the Respondent belonged to another gotrum, makes their testimony as to there being no suitable boy of the Appellant's "gotrum," more worthy of credit. It must be considered also that the adoption was a public one. No com-

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plaint was made at the time by any one of Appellant's relations. Information was given by the Appellant to the Collector on the 19th July, that she intended to adopt the Respondent, and on the 30th July she reported to the Collector, that the adoption *in conformity to the provisions* of Hindoo Law had been carried into effect.

16. The question of the validity or otherwise of the adoption of a person of another gotrum, was raised upon the supposition that in the present case, suitable persons of the Appellant's gotrum were available. The Court being of opinion that it has not been satisfactorily proved that there were suitable boys of the Appellant's gotrum available, have no hesitation in deciding that the adoption was a legal and valid one.

17. The next point for consideration is, whether the husband of the Appellant intended to confer by the will a beneficial interest on her. The Appellant was heir to her deceased husband, as there do not appear to have been any male lineal heirs. That he had the right during his life time, of alienating at pleasure the Zemindary Estate, may be fairly argued from the Decree in No. 3 of 1824 (S. U. Decrees, p. 449) passed by this Court; although on this particular point that Decree was opposed to the Decree of the Provincial Court founded on a reference made to the Pundit of their Court, and it does not appear that a question on the same point was referred by this Court to its Pundits.

18. The Court are of opinion that both from the wording of the will, and from other circumstances, there is reason to believe that the Appellant's husband did intend to confer on the Appellant, by the will, a beneficial interest of some kind or other. In the will itself he states, "I hereby authorize you, and the adopted son to enjoy for ever my Zemindary and its appurtenances." On the same date he addressed a petition to the Collector in which he states more fully his intentions towards the Appellant. In it he states "having no male issue, I executed a will to my wife Durma Samoodhany Ummal on a stamp paper of 50 Rupees value, authorizing her to adopt any child she likes in my caste according to Hindoo Law and entitling her to my Zemindary and other estate." The circumstance, which shows clearly that the will was intended to confer some beneficial right in the Zemindary is, that it is engrossed on a stamp of Rupees 50. Documents for sums between 20,000 and 50,000 Rupees, under the provisions of Section XI, Regulation XIII

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of 1816 may be written on a stamp of 50 Rupees value. By Section IV, Regulation II. of 1825 it is specially provided that "Wills" shall not be required to be written on stamp paper.

19. It must however be admitted that the terms of the will are most vague, as to what particular beneficial interest the Appellant's husband intended to confer on her. From there being no definite directions on this point, it may be surmised that he hoped and expected his widow and the son to be adopted by her, would live in amity and enjoy together the estate.

20. The last point for the consideration of the Court is whether a son having been adopted, the intentions of the Appellant's husband in conferring a beneficial interest on her, can be carried out, without violating the Hindoo Law.

21. It appears by the letter addressed by the Collector to the Board of Revenue under date the 16th May, that the husband of the Appellant succeeded to the Zemindary as the only surviving brother of the former Zemindar. The history of the family and of the Zemindary is recorded in the Decree No. 7 of 1823 (Reports of Madras S. U. Cases, p. 406). By that Decree it was decided that the Zemindary was an ancestral estate; "that it was not therefore competent for the Zemindar, by will, to divest the legal heir of his right to the succession, and that the will in that case was therefore a mere nullity and of no legal force or effect whatever."

22. It has been argued for the Appellant, that the late Zemindar, during his life time, might have conferred by gift, a life interest in the estate on his wife, with reversion to an adopted son, and that, such being the case, he might make the arrangements by will to take effect after his death. It was argued on the other side, that if there were male relatives of the Appellant's husband, he could not during his lifetime, have given a life interest to his widow, and that if there were no male heirs, she would *without any will,* have succeeded to a life interest in it.

23. It does not appear in this case that there were male relations of the Appellant's husband, and it appears by the evidence that she was heir to her husband. The Court do not therefore consider that the statement in the will of her being heir, confers any right upon her, that she had not before. It appears to be a mere declaration of the fact of

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her being heir. In the copy before the Court the translation runs thus, "as I have no male issue, you are heir to my Zemindary, &c." The Court do not consider therefore that any argument in Appellant's favour can be drawn from its being stated in the will, that the Appellant was the heir of the testator.

24. The Law of Inheritance, as it prevails in Bengal, differs so much from that in force in the Presidency of Madras, that the Court do not consider the following cases quoted in behalf of the Appellant, viz. Kishnonundo Biswar Prawn Kistnu Biswar, Macnaghten's Commentaries of Hindoo Law, page 370; cases from Cleland's Reports quoted at 281, vol. 1st, Morley's Digest, are beneficial to her case.

25. The case of Mussummant Tara Munnee Dibia, *versus* Dev Narayun Rai and Bishen Persaud (p. 387, vol. III of the S. D. A. Reports) certainly shows that a widow may hold a life interest in an estate, but in that case the right was conferred by the adopted son himself, who executed an agreement to that effect.

26. In the case of Rullom Monee Dassee Verme and Lal Behara Baloo, *versus* Berma Royee Dassee (S. D. A. Reports, p. 1846,) the Principal Sudder Ameen confirmed a deed by which it was provided, that two widows should each enjoy a moiety of an estate during their lives, and that on their deaths the adopted son of the one, and the heirs of the other should succeed to them. Upon the case being heard in Appeal before the Dewany Udalut, that Court considered the integrity of the deed not established, and dismissed the Suit. The Court observe that the Defendant in that suit pleaded that the deed was a forgery, and the *legality* or otherwise of the deed does appear to have been a point at issue; the decision of the Principal Sudder Ameen does not therefore, in the opinion of the Court, carry much weight with it.

27. In the case of Mulrauze Lutchmiah, *versus* Chalekany Vencatarama Jaganadharow (Moore's India appeal case, Vol. II. page 54), husband of the Appellant transferred certain lands by deed of gift during his lifetime to another person for maintenance and confirmed it by his will. The Court observes, first, that in that case the Zemindar executed during his life, a deed of gift; secondly, that the property so gifted, was self-acquired; and thirdly, that the Appellant was his widow and this

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property fell to her because there were no other heirs. It appears to have been considered that all that was required was that her husband should leave a sufficient "maintenance" or "provision" for her.

28. In the case of Mulrauze Venkata Vurdia, *versus* Mulrauze Lutchmiah, already quoted as No. 3. of 1824, decided by this Court (Decisions of S. U. p. 438) it was held that a Zemindar, having no heirs but his widows, might by will, devise in favour of his son-in-law, on the principle "that under the Hindoo Law, a man is authorized to dispose of his property by will, which under the same law, he could have alienated during his survivorship by any other instrument."

29. These are the cases that have been quoted in favor of the Appellant, the Court must now consider the case as it bears in favor of the Respondent.

30. The will under which the Appellant claims, contains also the authority for her to adopt a son, without such an authority an adoption would have been illegal. It need not be dwelt upon, of how much importance it is to the supposed spiritual welfare of a Hindoo to possess a son by whom his funeral ceremonies may be performed. Even in the case of an adoption with his permission by his widow, it is for his sake chiefly the son is adopted. On this point Sir Thomas Strange remarks, (Vol. I, p. 67) "the better reason therefore perhaps is, that the necessity of a son to celebrate the funeral rite, regards the man, rather than the woman, who depends less for redemption upon such means; so that, whenever, a woman, duly authorized, adopts, it is on her husband's account, and for his sake, not for her own, a child thus adopted acquires all the rights of a son, a child adopted by the widow or widows will stand in the same relation to the deceased husband's family, as he would have done had he been adopted by the husband himself, in his lifetime." (Macnaghten's Commentaries of Hindoo Law, p. 157.) To the same effect Sir Thomas Strange (Vol. I, p. 89) remarks "adoption being a substitution for a son begotten, its effect, is by transferring the adopted from his own family to constitute him son to the adopter, with a consequent exchange of rights and duties; of these the principal are the right of succession to the adopter on the one hand; with the correlative duty of performing for him his last obsequies on the other. *The right attaches to the entire property of the adopter, real and personal.*" In Sutherland's

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Treatise on the Hindoo Law of adoption, it is laid down in pages 228 and 229 that a legally adopted son is "invested with every filial right, in respect to his adoptive father, of whose family he becomes a member," and "he likewise represents the legitimate son in relationship to his adoptive mother, whose ancestors are his maternal grandsires."

31. The right of the adopted son appears to commence from the date the permission to adopt is given, for in the 4th Answer given by the Pundit in the case of Ramakishen Surkheyl (Sudder Dewany Adaulut Reports, Vol. III, page 367) it is stated, "the permission (which the de- "ceased son had left with his widow to adopt a son) being considered, in "the light of her pregnancy, in other words, the boy ultimately adopted, "being entitled to all the rights of a posthumous child." The same principle was laid down by the Pundit in the case of Ranee kishen Munee, *versus* Raja Oodwunt Sing (Sudder Dewany Adaulut Reports, Vol. III, page 229), Sir Thomas Strange, (Vol. I, page 89) further states these rights as follows, "should it have devolved upon a widow to adopt, her "husband's estate descending to her on his death, adoption subsequent "divests her succession, like the case of a posthumous child."

32. According to this theory the right of the Respondent in this case may be considered antecedent to that of the Appellant, for his right as heir at law, commenced from the day on which the will containing the permission to adopt was written. The Court do not consider the Appellant had any right in the property till the death of her husband, which took place on the day following, when she entered upon possession of it.

33. The Court consider the comments of Mr. Colebrook in the case of Ramen, *versus* Cootty Paudyanchee, Zillah Verdhachellum, (Strange, Vol. II, page 102) to be very strong in favour of the Respondent. Mr. Colebrook remarks, "presuming the property here spoken of as the "woman's, to have been what devolved upon her by the death of her "husband, and not to have been proper Stridhan, it ceased to be hers at "the moment of a valid adoption made by her of a son to her husband, "and herself; in the same manner as property coming into the hands of "a pregnant widow by the same means, cannot be used by her, as her "own, after the birth of a son. An adopted child is, in most respects, "precisely similar to a posthumous son. From the moment of the adop-

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"tion taking effect, the child became heir of the widow's husband; and "the widow could have no other authority but that of mother and "guardian."

34. It has been argued for the Appellant, that the will conferred upon the Appellant a right *like* that which would have been conferred by the gift of property as "Stridhan;" that in the present case the will took effect after death, but, if the property had been given during the life of her husband, it would have been her "Stridhan." The Court do not consider this a valid argument. If property which her husband could legally alienate, had been given to the Appellant as Stridhan during his life time, the entire right and title to it would have vested in her. In the present case she had no right to enter on possession of the property till the death of her husband, and befere she did so, her husband having given her permission to adopt a son, her right became merely conditional.

35. This Court in their decrees in Nos. 1 and 3 of 1825, (Report Cases, pages 498 and 511) observe, that wills can confer no right in opposition to Hindoo Law, and by Regulation V of 1829, it is prescribed that, "wills left by Hindoos within the Territories subject to this Go-"vernment, shall have no legal force whatever, except so far as their "contents may be in conformity with the provisions of the Hindoo Law, "according to the authorities prevalent in the respective provinces under "this Presidency."

36. The Court have perhaps gone into unnecessary length in quoting so much at large the cases which the parties in this Suit have brought forward in support of their claims, but the Court have been anxious on the one hand that the case of the Appellant, so ably and at great length pleaded by her Council, should be clearly exhibited; and on the other, that the principles of Hindoo Law which bear upon the case, and according to which it must be disposed of should be set forth at full length.

37. The conclusion to which the Court have been forced to come, for they freely admit that the case of the Appellant is a hard one, is that the will of the deceased Zemindar, in so far as it was his intention to confer on the Appellant a beneficial interest more than a maintenance suitable to her rank, is incompatible with Hindoo Law. The Court are of opinion,

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that from the time he executed the will, he conferred on the son to be adopted a right to succeed him, on his adoption, as heir of the Zemindary, and that on the adoption of the son, the Appellant became entitled merely to a maintenance.

38. The Court therefore approve of the judgment of the Lower Court and resolve to affirm the same, and to dismiss this appeal with costs.

No. 83 of 1851.

Decree dated 27th October 1852. *Page* 141 *M. V.*

1. The Original Suit was instituted against the Special Appellants as the 1st and 2nd Defendants and the 3rd Defendant for the recovery of Rupees 6,593-3-8, the principal, interest, and penalty due on a Bond alleged to have been executed on the 15th July 1842 by the 1st Defendant and his father, since deceased, to the husband of the Plaintiff, for Rupees 5,160 payable by eleven annual instalments upon a settlement of accounts, and for the due payment of which the 3rd Defendant, by a deed of execution on the same date, in which the produce of the 1st Defendant's Jaghire was mortgaged, became security, a deduction was allowed for repayments alleged to have been made on fourteen different occasions, amounting in the aggregate to Rupees 1,050.

3. The Subordinate Judge dismissed the claim, being of opinion that the evidence adduced by the Plaintiff to prove the execution of the Bond and Security Deed was, from discrepancies in the witnesses' statements, unworthy of credit.

4. In Appeal the Civil Judge considered that the only material discrepancy in the Statements of the Plaintiff's witnesses was to be attributed to one of their number, the 1st having been gained over by the Defendants, and on the ground that the evidence generally was corroborated by an account proved to have been written by the late husband of the Plaintiff, whilst the 1st Defendant's signature to the Bond corresponded with that affixed by him to a notice in another Suit, he reversed the decree of the Subordinate Judge and adjudged that the Defendant should make good the sum sued for, minus the penalty Rupees 350, with subsequent interest, in the aggregate Rupees 6,795-3-2 with costs.

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5. In support of the Special Appeal application it was urged,—

* * * * *

Thirdly. Because the Court had admitted as evidence, statements from witnesses which are not evidence according to Law, for instance the entries made in the book alleged to have been kept by the Plaintiff's deceased husband and alleged to be in his handwriting. Also that several of the witnesses spoke to the contents of documents, alleged to have been executed by the Special Appellants, or by the 3rd Defendant, but which were not produced to the witnesses nor was any ground previously laid which would have warranted the introduction of secondary evidence.

Fourthly. Because the said Civil Court had admitted proof of handwriting by comparison which was contrary to Law.

Fifthly. Because the pretended Kararnamah was alleged to have been executed by the 3rd Defendant who had no title to the Village which it was pretended was thereby mortgaged to the Plaintiff's husband; and no authority from the said 1st Defendant and the Special Appellant's father, or either of them to the said third Defendant to execute the same was shown, and

Sixthly. That no interest was reserved by the said pretended Bond, and therefore if that document had been a genuine one, no interest could be recovered under it.

9. In regard to the 3rd point, the Court observe that the admission of the Document C. and of the evidence in proof of that Document being in the handwriting of the Plaintiff's late husband, merely as corroborative proof, was not illegal but in accordance with the usage and practice of the Courts, and that the other evidence objected to does not appear to have been allowed any weight by the Civil Judge, and is not even alluded to in his Decree.

10. The 4th objection, that proof of handwriting by comparison is contrary to Law, does not appear to be valid—comparison of handwriting is allowed in some cases by the practice of the Court in England; and the Company's Courts in this country, constantly at their discretion, have recourse to comparison of a disputed signature with one admitted to be genuine, which is all that was done in this case. Such practice is not

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contrary to any Law in force in this country, and is often found a most useful assistance to the Court in the appreciation of conflicting statements and evidence.

11. In reference to the 5th and 6th points it seems sufficient to remark, that the Civil Judge did not in his Decree pass any decision in regard to the validity of the mortgage of a Village conditioned in the Rauzeenamah in question, and that when interest is not expressly reserved in a Bond, Act XXXII of 1839, gives discretionary power to the Courts to award interest or disallow it according to the circumstances of the case.

No. 71 of 1852.

Decree dated 30th October 1852. *Page* 147 *M. V.*

8. The Court of Sudder Udalut observe that the District Moonsiff dispensed with two of the witnesses cited by the Defendant remarking merely in his Decree that the Defendant had failed to produce them and that he did not find it necessary to examine them. These witnesses are stated to be the Adhikary and Menon of the village, the very persons who ought to be able from their official position to give evidence regarding the point chiefly at issue in this Suit and who might have naturally been expected to be cited by both parties. If these persons did not attend on summons it was the duty of the District Moonsiff to resort to the means pointed out in Clause first, Section XXIX, Regulation VI. of 1816, to enforce their attendance, and the Lower Courts having failed to take the requisite measures to obtain their evidence, the Court of Sudder Udalut resolve to direct the case to be remanded to the Court of Original Jurisdiction with a view to such defect in the investigation of it being remedied and decision passed de novo on the merits.

No. 73 of 1852.

Decree dated 20th November 1852. *Page* 161 *M. V.*

1. The Original Suit in this case was instituted by the Petitioner in the Sudder Ameen's Court at Combaconum against three Defendants for the recovery of Rupees 938-2-9, the value of certain areka nuts.

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3. The Sudder Ameen was of opinion that the settlement of accounts between the fathers of Plaintiff and 1st Defendant had been authenticated; that it was proved that 1st Defendant's father had authorized Plaintiff's father to sell the nuts; and that the Acheen authorities had levied Rupees 938-2-9 from Plaintiff. The Sudder Ameen also decided that certain exceptions taken by 1st Defendant to the genuineness of a copy of the Decree of the Acheen Court produced by Plaintiff, were groundless; he considered however that it had been clearly proved that 1st Defendant's father, 2d Defendant, and 3rd Defendant's husband had not possessed joint family interests.

4. The amount claimed was therefore decreed to be paid by the 1st Defendant singly with costs.

5. The Assistant Judge of Combaconum in Appeal, reversed the original decision with all costs, on the ground that the Suit was not actionable, as being of the nature of an Appeal against a Decree of a Court of Justice of a Foreign independent kingdom, to the jurisdiction of which Plaintiff had voluntarily rendered himself amenable.

7. The Court of Sudder Udalut resolve to admit a Special Appeal in this case; the sole ground upon which the Assistant Judge reversed the the decision of the Sudder Ameen and dismissed the Plaintiff's (Respondent's) claim, viz. that the Suit was not actionable, as being of the nature of an Appeal against the Decree of a Court of Justice of a Foreign independent kingdom, being, in their opinion, obviously erroneous.

8. And having done so, they further resolve to remand the Suit to the Lower Court, in order that it may be duly decided on the merits.

No. 75 OF 1851.

DECREE DATED 1ST DECEMBER 1852. *Page* 166 *M. V.*

13. The Court of Sudder Udalut do not expect to find, nor do they require the same formality and regularity in decisions given by Military Courts of Requests, as in the established Civil Courts. The County Courts in England, as argued by the Respondent's pleader, keep no re-

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cord. If persons chose to carry on business at a Military Bazar station, they subject themselves to the jurisdiction of Military Courts of Requests. Unless it clearly appear that injustice has been committed, the Court of Sudder Udalut will not consider it necessary to remand cases, because the record of the evidence is not so full or the procedure so regular as it would have been under one of the constituted Tribunals of the Country. One most serious objection to such remands is that it would be doubtful whether any of the Members of the Original Court of Requests would still be at the station.

No. 82 of 1851.

Decree dated 1st December 1852. *Page* 168 *M. V.*

1. This is an Appeal from a decision passed by a Military Court of Requests adjudging the Appellant to pay to the Respondent, Hyderabad Rupees 2,643-6.

2. By the Proceedings of the Court of Requests it appears that the Respondent sued for Hydrabad Rs. 9,503, money lent. The Respondend and Appellant in the presence of the Court agreed to submit the accounts connected with this claim for examination by Assessors, to be composed of two selected by the Respondent, two selected by Appellant and one by the Police Magistrate of Secundrabad. The Assessors were engaged under the supervision of the Court from the 26th May to 4th June 1851, in examining the Books and accounts connected with this case; when they appeared in Court, and having been duly affirmed, stated that after careful examination they found that the accounts showed a balance in favor of Respondent, of Hyderabad Rs. 2,643-6-0.

3. The Court therefore gave an award in favor of the Respondent, for that sum.

4. The Appellant states, as the ground of his Appeal that one Chundoo booked the contract in 1845 and sub-rented it to three others; that Chundoo's heirs, and not Appellant, were responsible to the Respondent, that the Appellant was also not responsible for the balance due to the Respondent in 1846 and 1818. That the person appointed

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third arbitrator, sent a deputy, and that the accounts were not properly examined by the Assessors. That in another Suit the persons who examined the accounts for 1846, said that in consequence of some leaves of the Cadjan having been torn away, they did not admit of adjustment.

7. There is nothing on the Proceedings of the Court of Requests to show that the Appellant pleaded before the Court, that he was not responsible for the amount claimed by the Respondent, the fact of his agreeing to submit the accounts to Assessors for examination, shows that the point of issue before that Court was not the liability of the Appellant, but the amount due to the Respondent. The Court cannot allow the Appellant to bring forward a new plea as a ground for appealing against the decision passed against him. The Proceedings of the Court of Requests lead the Court to conclude that the accounts were carefully examined under the supervision of the Court of Requests. The Court of Sudder Udalut seeing therefore no sufficient reasons to disturb the decision passed by the Court of Requests, dismiss this Appeal.

No. 36 of 1852.

Decree dated 8th December 1852. *Page* 170 *M. V.*

1. The Original Suit was instituted by one Tandavaroya Moodelly against the Special Appellant for the recovery of Rupees 118-8-6, on account of arrears of rent due on a Bungalow occupied by Defendant.

4. The Principal Sudder Ameen was of opinion that the proper rent of the Bungalow was Rupees 25 and not Rupees 28 as stated by Plaintiff. He also considered it established that a general sanction for making the necessary repairs had been granted by Plaintiff to Defendant, and saw no reason to doubt the correctness of Defendant's estimate of the same. The Principal Sudder Ameen accordingly decreed that the said sum of Rupees 206-6-9 should be deducted from Rupees 355-13-4 the amount of rent due up to the date of the decree at Rupees 25 per mensem, and that the balance Rupees 149-6-7 should be paid to the Plaintiff, each party being assessed with their own costs.

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5. From this decision Plaintiff appealed, merely reiterating however the grounds set forth in his Plaint.

8. The Civil Judge concurred with the Principal Sudder Ameen in considering it established that the rent of the Bungalow was only Rs. 25, and in respect to the repairs executed by Defendant that Officer observed.—" It seems also clearly proved that the Plaintiff did give a " general assent to the Defendant making such outlay for his comfortable " accommodation chargeable to the rent as might be required by him and " although such permission could of course be cancelled by giving due " notice of its withdrawal, it does not appear that the Plaintiff ever gave " such notice until he did so by instituting this Suit, which is of course " tantamount to a formal notice of the withdrawal of the permission for- " merly given. Plaintiff is therefore bound by the general permission " given by him in regard to the outlay made by the Defendant up to the " date of the institution of this Suit, but no longer."

9. On the above grounds the Civil Judge confirmed the Decree of the Principal Sudder Ameen, and assessed the Appellant with the costs of his Appeal.

11. The Court of Sudder Udalut admitted a Special Appeal in this case, inasmuch as the Lower Courts had decided upon a matter that was not in issue before them. The amount claimed was the rent up to the date of Plaint, against which a set off was made by the Defendant for repairs done to the property with the consent of Plaintiff and which were shown to exceed the sum for which the action was brought.

12. The Court of Sudder Udalut are of opinion that for the reasons stated in admitting the application for a Special Appeal, the Decrees of the Lower Courts cannot be confirmed. The Special Respondent sued for Rupees 118-8-6 being arrears of rent of a house. The Special Appellant pleaded as an off-set that he had expended Rupees 206-6-9 in repairs—this plea was admitted by the Lower Courts, such being the case the Suit should have been dismissed.

13. The Circular Order of the 22nd October 1829 does not apply to this case. That is only applicable to cases in which the lands or houses on which rent is due are claimed, as well as rent itself.

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No. 25 of 1851.

Decree dated 20th December 1852. *Page* 175 *M. V.*

1. The Original Suit was instituted to establish the Plaintiff's right to a moiety of the estate of her mother, the 1st Defendant, on the demise of the latter, and for maintenance during 1st Defendant's lifetime.

2. The 1st Defendant pleaded that she had, under authority from her deceased husband, adopted the 2nd son of her daughter, the 2nd Defendant, by the 3rd Defendant, and that all the estate would consequently devolve upon him.

3. The Moofty Sudder Ameen was of opinion that the 1st Defendant's husband had not authorized his widow to adopt and that even had he done so, the adoption would not stand, the affiliation of a daughter's son being contrary to Hindoo Law. He therefore decreed that the 1st Defendant's estate should be equally shared between the Plaintiff and 2nd Defendant.

4. The 1st Defendant having died, the 2nd and 3rd Defendants appealed from this Decree, which was however affirmed, with some slight modification as to the quantity of land in one particular village, by the Civil Judge, who in concurrence with the Moofty Sudder Ameen discredited the evidence adduced to show that the 1st Defendant was authorized to adopt, and held that the adoption of a daughter's son was invalid.

5. In the application for the admission of a Special Appeal the 2nd and 3rd Defendants urged—that on the 23rd April 1818 the Pundits of the Sudder Udalut had declared, that a daughter having a son would exclude a sonless daughter.

6. The Petitioner's Vakeel having also pleaded orally in support of the foregoing application, the Court of Sudder Udalut passed orders on the 16th September 1850 declining to enter into any plea excepting such as had been put forth before the Lower Courts, viz., that the succession to the disputed property vested in the son of the 2nd and 3rd Defendants, he having been adopted by 1st Defendant in accordance with her deceased husband's desire. After a consideration of this point the Court of Sudder Udalut rejected the application.

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7. After petitioning for a review of the order of 16th September 1850 which was refused by the Court's proceedings of 13th March 1851, the Special Appellant again prayed for a reconsideration of their orders on the ground "that the Civil Judge's Decree is in error in that it declares the original Plaintiff, the Respondent in the Suit, entitled to a share of her deceased father's estate, she being an endowed and childless widow—the 2nd Special Appellant, this Petitioner, being a married woman having male issue, and consequently entitled to the whole estate."

8. On a reconsideration of the case it appeared to the Court of Sudder Udalut that it was the duty of the Lower Courts to determine the above point of Law, and to have decided accordingly, notwithstanding the Petitioner's omission to place it immediately before them; and in order that this course might be adopted the Court deemed fit, in virtue of the power vested in them by Clause 3rd, Section VI, Regulation XV. of 1816 to set aside their orders of the 16th September 1850 and 13th March 1851, and admit a Special Appeal.

9. On the point for the determination of which the Special Appeal was admitted, the following opinion was delivered by the Pundits of the Sudder Udalut.

"The daughter D, who is mother of male issue, and not the daughter C who is destitute of sons; being capable of conferring benefits upon her (deceased) parents through her sons, the former has greater propinquity than the latter and is therefore entitled by the provisions of the Hindoo Law Books Smriti Chendrika," &c., to inherit the property of B, subject however to the obligation of providing C. with money sufficient for her maintenance in the event of her (C) being destitute of property."

11. As it appears from the answer of the Pundits of this Court that under the circumstances of the case, the 2nd Defendant (2nd Special Appellant) is entitled under the provisions of the Hindoo Law to inherit the whole of the property of the 1st Defendant, deceased, and that the Plaintiff (Special Respondent) is entitled only to maintenance, to be provided by the said 2nd Defendant in the event of her (Plaintiff) being destitute of property, the Court of Sudder Udalut consider that the Decrees of the Lower Courts must be reversed and the claim of the Plaintiff

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(Special Respondent) to a moiety of the disputed property dismissed, leaving her to institude a fresh Suit for the recovery of maintenance from the Special Appellants in case she should consider herself duly entitled thereto with reference to the answer of the Pundits aforesaid, and they (Special Appellants) should refuse or neglect to supply her therewith accordingly.

1853.

No. 5 of 1853.

Decree dated 24th January 1853. *Page* 5 *M. V.*

1. The Original Suit No. 383 of 1849, was brought by the Plaintiff Jadarajah (Special Appeal Petitioner) in the District Moonsiff's Court, against Partasaraty Naiken and three others, to recover a fourth share (valued at Rupees 65-10-0) of one of the twelve shares composing the village of Paravaloor in the Sydapettah Talook: and also a sum of Rupees 71-6-0.

4. The District Moonsiff decreed that the disputed quarter share should be given up to the Plaintiff, and that the principal and interest of Rs. 79-14-0, including penalty, 5 Rs. should be paid by the 1st Defendant to Plaintiff with Interest up to the date of payment, and the costs incurred by Plaintiff, and that the costs of 2nd Defendant be paid by him.

5. This Decree was reversed, in Appeal (preferred by the 2nd Defendant in Original Suit) by the Principal Sudder Ameen in his Decree dated 19th July 1852.

6. The Principal Sudder Ameen grounds this reversal of the decision of the District Moonsiff upon the circumstance that the Deed No. 20, upon which the Respondent founded his claim, and which was admitted as valid by the District Moonsiff, is not deserving of credit.

1st. In having been executed concerning property which at the date of the execution of the said Document, was under litigation in a Suit No. 346 of 1848; the result of which Suit was a Razeenamah by which the 3rd Defendant confirmed the right of the 1st Defendant, who subsequently sold this property to the 2nd Defendant (Appellant.)

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2nd. Because the signature of the 1st Defendant as shown in Document No. 20, differs from the signature of the 1st Defendant as shown in Document Nos. 38 and 39, filed by the Appellant, which Documents are acknowledged by the 1st Defendant to have been executed to the Appellant.

7. From this Decree of the Principal Sudder Ameen, Petitioner (Plaintiff in Original Suit) seeks to obtain admission of a Special Appeal on the following grounds.

* * * *

3rd. The Deed of Sale No. 20, cannot be considered to have been rendered invalid as stated by the Principal Sudder Ameen on account of its being for land at that time under litigation, although the Razeenamah is dated 12th April 1849, and Petitioner's Deed of Sale the 16th January 1849: the Razeenamah which confirms 1st Defendant's right to the share, also confirms right of Petitioner who had purchased the same from 1st Defendant. The fact of this Sale has been proved by witness No. 52, brother-in-law of the 1st Defendant, and by other witnesses.

8. As respects the two grounds upon which the Principal Sudder Ameen's Decree is based, the Court of Sudder Udalut are of opinion, that the first embraces no fact of illegality bearing against the Special Appellant's claim, and that the second is of an inconclusive nature, and finding that the Principal Sudder Ameen has rejected the claim without recording any opinion on the oral and documentary evidence adduced on both sides which affect it, they resolve to admit this Special Appeal and to remand the Suit to the Principal Sudder Ameen for revision of judgment.

No. 7 of 1853.

Decree dated 27th January 1853. *Page* 9 *M. V.*

1. The Original Suit was preferred against Special Appellant by the the Plaintiff therein, his Goomastah, for a certain sum of money due to him as salary.

2. The Moofty Sudder Ameen of Bellary received oral and documentary evidence on both sides, and dismissed the Plaintiff's claim with costs.

3. On Appeal, the Civil Judge referred the matter to a Punchayet, under the provisions of Regulation XXI of 1802, and adopting the

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judgment of the Umpire among the Arbitrators, gave decree in favor of the Appellant awarding him what he sued for with costs.

4. The Special Appeal Petitioner brings forward the following grounds for his Special Appeal.

1st. That the Appeal Decree is contrary to Law, because Regulation XXI of 1802 is inapplicable to Appeal Suits, and the course pursued by the Civil Judge is contrary to the practice of the Courts.

2nd. Because the Umpire who made the award has been guilty of gross corruption and partiality in the Appeal Suit.

5. The Petitioner refers to the Diary of this Court dated 19th June 1837 in No. 699 deciding that Regulation XXI of 1802, does not authorize the reference to Arbitration of Appeal Causes, and explains that both himself and his Vakeel acted in ignorance of the Law.

6. The Court of Sudder Udalut have ruled under date the 19th June 1837 to the effect that it is not competent to an Appeal Court to send a Suit in Appeal before it to arbitration under Regulation XXI of 1802, but that that Regulation can be called into exercise only in regard to Original Suits.

7. Acting upon this construction of the Law, the Court of Sudder Udalut resolve to admit a Special Appeal in this case, the decree in Appeal given by the Civil Judge in adoption of an award of Arbitrators being viewed by them as illegal.

8. The Court of Sudder Udalut remand the case to the Civil Judge, whose duty it will be to give decision upon the merits of the evidence adduced before the Sudder Ameen: or if the inquiry before that Officer be deemed by him insufficient, to remand the Suit to him for revision of judgment; and he will furthermore be at liberty, should he consider that the ends of justice make such a course desirable, to direct the Sudder Ameen to call upon the parties to submit the case to arbitration under the aforesaid Regulation XXI of 1802.

9. The Court of Sudder Udalut have to point out to the Civil Judge that in adopting a decision of Arbritrators it is necessary that the grounds of such decision should be set forth in the decree that may be founded thereon, a particular in which his decree is observed to be defective.

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No. 90 of 1851.

Decree dated 29th January 1853. *Page* 11 *M. V.*

1. The Original Suit was brought by the Plaintiff against his elder brother, Defendant, the present possessor of the Zemindary of Shivagiri, Tinnevelly District, paying a peshcush to Government annually of Rupees 56,000-0-0.

2. Plaintiff sought to recover a moiety of this Estate producing yearly Rupees 48,785-0-0, and his share of personal properties to the amount of Rupees 32,797-0-0.

6. The Acting Civil Judge decided that as it had been admitted on both sides that the Zemindary under dispute was ancient, that it had never been divided, and that in the Report of the Special Commission, dated 5th April 1803, at which time it was held by an ancestor of Defendant it was entered as an ancient Zemindary, the Law of Primogeniture was applicable in the case, and the Plaintiff had no title to partition, as claimed by him. As regarded the personal property, the Acting Civil Judge considered that this point need not be considered, an agreement regarding maintenance having been made with all due publicity, by the brothers, and one which was perfectly in accordance with the custom of the country.

Vide Para. 26, Decree of Court of Sudder Udalut in Appeal Suit No. 20 of 1846.

7. The statement that there had been a later proposal made for a partition of the Zemindary was not in the opinion of the Acting Civil Judge supported by any evidence deserving credit.

8. For these reasons the Suit was dismissed with costs.

9. The Appellant appeals against this decision on the following grounds.

* * * *

4th. That the Law of Primogeniture is only applicable to ancient hereditary Zemindaries descending from father to son, and not to Zemindaries descending from a grandfather to a daughter's son, as in this case, which latter were to be considered as new acquirements and not as hereditary possessions.

13. At regards the 4th ground, in which Appellant endeavours to show that the Law of Primogeniture is not applicable to the Shivagiri Zemindary, and that the Zemindary is to be regarded as a recent acquisi-

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tion; the Respondent submits that in accordance with the Chapter upon Inheritance on failure of sons in the works entitled Mitakshara of Vijnaneswara, Smrit Chandrika, and the Yaokapunchanana of Jayamadha, "a grandson, being the son of a daughter is held to have inherited property by virtue of his right as such, from his sonless maternal grandfather, only when that property descends to the grandson direct from his grandfather dying without leaving wife or daughter, and that when upon the death of an individual his property devolves upon his representative, such property should be called that of the successor, not that of the deceased;" that in the present case the maternal grandfather of both parties died in 1819, and the Zemindary descended to his only daughter (their mother) Virammah Nachiyar who enjoyed the same until her death in 1836, when according to the custom of the country and the Hindoo Law of Primogeniture in the case of Regalities, the Zemindary descended to the Respondent, whose right was also recognizd by the Government through the Collector. That as regards the assertion of its being a recent acquisition, this term applies to property obtained by sale, gift, or valour, independent of descent; and that it has been shown that this Zemindary belonged to the ancestors of the Respondent, and was enjoyed by them singly, and that it cannot be termed a recent acquisition.

15. The Court of Sudder Udalut having maturely considered the decree of the Lower Court and the arguments brought by the Appellant in objection thereto are of opinion that the said decree is in entire accordance with the facts and the Law of the case, and therefore hereby confirm it.

No. 27 of 1852.

Decree dated 5th February 1853. *Page* 20 *M. V.*

1. The Original Suit was instituted by the Special Appellant before the Moofty Sudder Ameen of Combaconum to establish his claim to certain land valued at Rupees 44-1-8, and to two houses valued at Rs. 1045-0, to which he alleged he was entitled as ancestral property.

3. The Moofty Sudder Ameen decreed in favor of Plaintiff, observing that the Plaintiff's relationship had been satisfactorily proved, and that there was conclusive evidence that no division of the family property had taken place.

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4. The 1st, 3rd, and 5th Defendants separately appealed from this decree—and the Assistant Judge of Combaconum reversed the Original Decree dismissing Plaintiff's claim as being barred by the Statute of Limitation—Plaintiff's father having died 25 years before the institution of the Suit—there being no proof of the Plaintiff ever having been in the enjoyment of the land sued for—and the nondivision of the Plaintiff's father and the other members of the family upon which the Moofty Sudder Ameen had based his decision, under these circumstances proving nothing to establish the claim of the Plaintiff.

5. The Special Appellant grounded his application for Special Appeal on the fact that the Statue of Limitation does not apply to cases of inheritance under the Hindu Law and adverts to the Decree passed in Appeal Suit No. 32 of 1850, on the file of the Sudder Udalut; he also contends that the fact of there having been no division in the family, had been clearly shown—and further, that this joint enjoyment of the land sued for, was clearly proved by the 1st Defendant and himself having jointly performed the religious ceremonies of the family; which circumstance had not been sufficiently considered by the Appellate Court.

6. The Court of Sudder Udalut resolve to admit a Special Appeal in this case with a view of ascertaining whether the Statute of Limitation upon which the Assistant Judge had bassed his Decree applied to the Appellant's case.

12. The Court of Sudder Udalut having considered the point raised in the certificate of Special Appeal, and the Vakeels of both parties having been heard orally, they are of opinion that the Subordinate Judge's decision is correct.

13. They therefore confirm the said judgment.

14. The Court consider that the Statute of Limitation has been rightly declared applicable in this case.

15. This Plaintiff claimed as a cousin, a partition of property asserted to be ancestral.

16. The Plaintiff's father died 25 years before the institution of this Suit, and at the time of his death was not residing as a joint member of the family.

17. It is proved that the Plaintiff never lived with his cousins, and it has not been found that any one act has passed between them showing that they were co-parceners.

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No. 10 of 1853.

Decree dated 7th February 1853. *Page* 25 *M. V.*

1. The Original Suit was instituted by the Special Appellant in formâ Pauperis against the Collector of Madura and 21 other Defendants for the recovery of two pieces of ground valued at Rupees 3,000.

2. The origin of the Suit is set forth in the Decree of the Sudder Udalut in Special Appeal Suit No. 31 of 1850, (printed at page 86 of the 2nd Vol. of the Decisions of the Sudder Udalut) reversing the decision of the Civil Judge of Madura on the ground that the Suit was barred by the provisions of Section XVIII, Regulation II. of 1802, and remanding the Suit with an injunction to dispose of it on its merits.

3. The Civil Judge of Madura in the revised Decree passed by him under date the 31st March 1851, assuming that the Decree of the Sudder Udalut related only to the bar which Clause fourth of the Section above quoted might present to the adjudication of the Special Appellant's claim, waved the objection previously taken by him with reference to Clause fourth, and then proceeded to judge of the Special Appellant's case under Clause third of the said Section ; and conceiving this enactment to bar the Suit, again dismissed it without passing judgment upon its merits.

4. This decision was set aside by the Sudder Udalut in their Decree in Special Appeal, No. 97 of 1851, (printed at page 256 of the 3rd Vol. of the Decisions of the Sudder Udalut), wherein it was ruled that the circumstances of the Special Appellant's claim showed that the cause of action had arisen subsequently to 1802, and that therefore the Suit was not barred by the Clause quoted by the Civil Judge. The Suit was accordingly again remanded and the Civil Judge directed to dispose of the case upon its merits.

5. In his second revised Decree the Civil Judge has again decided that the Suit is barred by Clause third, Section XVIII, Regulation II of 1802, and assuming that the question involved in the Sudder Court's Decree in Special Appeal, No. 97 of 1851, is one of fact and not of Law and one consequently on which the presiding Judge is bound to decide according to his own appreciation of the evidence, he has again reversed

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the Decree of the Subordinate Judge, and dismissed the Suit without passing any judgment on its merits—at the conclusion of his Decree he observes that the Suit is further barred by Clause fourth of the said Section.

6. From this decision the Special Appellant has preferred an application for the admission of a Special Appeal, which has been admitted by the Court of Sudder Udalut on the ground that the Decree of the Civil Judge is illegal, inasmuch as it amounts to a reversal of the judgment passed by the Court of Sudder Udalut upon the point upon which the Civil Judge has for the third time dismissed the Special Appellant's claim without giving any decision upon its merits.

7. The circumstances of the Special Appellant's case have not admitted of dispute and the only question hitherto raised in it was the applicability of the Statute of Limitations thereto, involving thus a construction of Law which was decided by the Sudder Udalut in the two Decrees above referred to.

8. In his second revised Decree of the 16th June 1852, the Civil Judge attributes to the Court the having passed their judgment on a question of fact, and not of Law, and claiming to himself (under what authority it appears not) the power of setting them right, he has proceeded to amend their judgment by one of his own, under which he has declared the Suit to be barred by Clause 3rd of the Section referred to—he has also gone on to declare that it is furthermore barred by Clause fourth—thus departing from his Decree of the 21st February 1851, wherein he had submitted to the Decree of the Sudder Udalut, in Special Appeal No. 31 of 1850, before cited, and seeking to render nugatory this decision also of the Sudder Udalut.

9. The course which the Civil Judge has taken appears to the Court of Sudder Udalut most presumptuous and irregular. The Law has placed him in a position requiring that he should conform himself to the decisions of this Court and carry out strictly and truly the orders which they may communicate to him, whereas the Civil Judge indulges himself in cavilling at these orders and in either evading or defying them, the end he arrives at being the upholding of his own opinions to the subversion of those of the tribunal holding appellate jurisdiction over him.

10. The Decree of the Civil Judge now appealed from being altogether illegal, the Court of Sudder Udalut resolve again to remand the

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case to the Civil Judge with an injunction to give decision upon the Special Appellant's claim on its merits without further reference to the provisions of either Clause 3rd or 4th of Section XVIII, Regulation II of 1802, which have been finally and authoritatively pronounced to present no bar to adjudication thereupon.

11. The Court of Sudder Udalut deem it proper to warn the Civil Judge that any repetition of conduct such as is now animadverted on will entail upon the Court the necessity of bringing the same under the notice of Government.

No. 12 of 1853.

Decree dated 10th February 1853. *Page* 27 *M. V.*

9. The Court of Sudder Udalut have further to point out to the Collector, that from the documents before them, it is not to be gathered that the Plaintiffs had any forcible dispossession to allege before him, and consequently that there were no grounds for his reception of a Suit at their instance under Regulation V of 1822.

No. 24 of 1851.

Decree dated 15th February 1853. *Page* 32 *M. V.*

1. The Suit was laid for recovery of Rupees 1,000, as principal and interest due under a mortgage bond executed by Goondooput, the ancestor of the Defendants, in September 1831.

2. The 1st Defendant acknowledged that he had countersigned the bond at the desire of his father, the aforesaid Goondooput, but stated that the property therein referred to had previously to the date of the bond, fallen to the share of the 2nd and 3rd Defendants on a partition of the property then made, and that they should be charged with the claim rather than himself. He also pleaded the Statute of Limitation against the bond.

3. The 2nd and 3rd Defendants denied all knowledge of the bond,

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and the 5th and 6th contended that they were not answerable for Goondooput's debts, as they had derived no property from him.

4. The Sudder Ameen decreed that the 1st, 2nd and 3rd Defendants, should satisfy the Plaintiff's claim, and absolved the other Defendants from it.

5. The 2nd and 3rd Defendants appealed to the Civil Judge, who modified the Sudder Ameen's decision by decreeing that the 1st Defendant should in the first instance be required to discharge the bond, and that failing his ability to do so, the 2nd and 3rd Defendants should be liable for it to the extent of certain property inherited by them from Goondooput, subsequently to the date of the bond.

6. The Court of Sudder Udalut admitted a Special Appeal in this Suit, because it appeared on the face of the pleadings that the Suit was barred by the Statute of Limitation. Finding that there was no allegation that the claim which forms the ground of action had been acknowledged prior to the year 1844, or for a space for more than 12 years from the time when it had arisen, the Court reversed the Decree of the Lower Courts and dismissed the Suit with costs. Having had reason on motion being made for review of judgment to question the soundness of the above decision, the Court of Sudder Udalut have re-admitted the Suit on their file in order to determine afresh the question of law involved therein.

7. In Macpherson's Work on the Procedure of the Bengal Adalut Courts, it is laid down (p. 63) as having been ruled by the Sudder Dewany Udalut, that "a simple written acknowledgment of "the truth of a demand is not sufficient to constitute a new ground of "action so as to bring within the cognizance of the Courts a Suit, the pre-"scribed period for instituting which has once fully elapsed," and this ruling is introduced under a Section of the work entitled, "First exception "to the 12 years' rule, demand and acknowledgment," and the marginal notification is to the effect that the ruling in question shows acknowledgment after 12 years to be ineffectual. The Madras Law of Limitation being a copy word for word of that prevailing in Bengal, this representation in Macpherson's work, the accuracy of which the Court of Sudder Udalut had at the time no reason for mistrusting, afforded

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what appeared to be a sufficiently authoritative indication of the construction to be put upon the said law, and in view thereof, the Court were led to pass their decision dismissing the claim in litigation as barred by that law, an acknowledgment thereof after the term of 12 years had expired, not appearing sufficient to "revive it and make the bond an actionable one."

8. The Court of Sudder Udalut now find the indication given in Macpherson, of the ruling of the Sudder Dewany Udalut, to be entirely an erroneous one, and that the ruling had reference to Suits cognizable by Moonsiffs, which under the Bengal Law are entertainable only if lodged within one year from the time when the cause of action might have arisen, and in no respect related to the Law of Limitation for the Superior Courts now under consideration, a prominent distinction between the two Laws being, that the latter contemplates the keeping open a claim by means of acknowledgment thereof, but the former contains no such provision whatever, a reference to Marshman's Guide to the Civil Law of Bengal, Con. 196, p. 226, being the instance cited in Macpherson, and Clause 1st, Section XIII. Regulation XXXIII of 1844, Bengal Code, has led to the detection of the above error in Macpherson.

9. Released from the apparent precedent presented to them in Macpherson, and upon further consideration of the Law before them, the Court of Sudder Udalut are led to take a different view of the said Law, from that propounded by them in their primary decree in this Suit.

10. The language of the Law (Clause 4th, Section XVIII, Regulation II of 1802,) is thus:

11. "The Courts of Udalut are prohibited hearing, trying, or " determining, the merits of any Suit whatever against any person or " persons, if the cause of action shall have arisen 12 years before any Suit " shall have been commenced on account of it, unless the Complainant " can show by clear and positive proof, that he had demanded the money " or matter in question, and that the Defendant had admitted the truth of " the demand, or promised to pay the money; or that he directly prefer- " red his claim within that period," to a competent tribunal.

12. It appears to the Court of Sudder Udalut, that the punctuation adopted in Campbell's code, where a semicolon occurs after the words

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"promised to pay the money" indicates the way in which the words "within that period" in the succeeding Clause should be applied, and that the said words have reference to the last Clause and not to the prior portion of the Section. A Suit to prevent the operation of the bar of the Statute of Limitation must necessarily be brought "within the period" limited under it, but an acknowledgment of claim is not of necessity cramped by the like condition. The occurrence of such acknowledgment is a distinct admission on the part of the person liable for it that the claim is alive, and if so, it should be actionable, and not be extinguished and rendered unactionable, unless the period specified in the Statute, calculating from the date of such admission, should have run out without any renewal of admission or institution of a Suit having had place. Under this view then every admission of a claim serves to revive it for the period laid down in the said Statute.

13. The Court of Sudder Udalut, are fortified in their present construction of the Law in question, by a decision of the Privy Council passed on the 17th December 1836, on an appeal by Bhaee-chund and Koosal-chund, versus Purtub-chund, Manik-chund (Moore, vol: I. p. 154.) The bond then in issue was 27 years old, when the Suit was filed, and admission of debt was alleged to have been made during the Suit by the Defendant having offered to compromise the Suit. The Appellate Court, and after them the Privy Council, entered upon a consideration of the said alleged offers of compromise to determine whether or not they sufficed to remove the bar of the Statute of Limitation, an investigation which it is obvious would not have been engaged in, had the claim been considered to have already expired, ere the occurrence of the said offers, by no admission of debt having been made within 12 years from the cause of action.

14. The claim now under decision was laid in the year 1847, and the document B, which the 1st Defendant has admitted as his act, and the evidence of the Special Appellant's (Plaintiff's) 1st, 3rd, and 4th witnesses, proved that the debt was confessed in 1844 and 1845. The Court of Sudder Udalut consequently find the claim not barred by the Statute of Limitation, and hence see no ground for interfering with the Decree of the Civil Judge which is therefore hereby confirmed.

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No. 11 OF 1852.

DECREE DATED 17TH FEBRUARY 1853. *Page* 35 *M. V.*

1. The Orginal Suit was instituted to establish the right of the Plaintiff as Meerassidar, to $\frac{4}{25}$ of the Hamlet of Alinjepaukum, and for arrears of the Swatuntrums of that and five other Hamlets attached to the village of Poolal, or the Red Hills, all valued at Rs. 1,243-8-9.

2. The Defendants averred that the Plaintiff, and the other sharers mortgaged the said Hamlets to them in 1827, and the mortgage term having expired, the Hamlets became their property; that in 1841, Alinjepaukum was given over to them under the Razeenamah filed in Original Suit, No. 101 of that year; that this Suit was in appeal remanded by the Sudder Udalut, upon which, they being satisfied with the possession of the said village, withdrew the Suit.

3. The Acting Mootty Sudder Ameen was of opinion, that the said Razeenamah was a fraudulent fabrication; and he decreed to the Plaintiff the share claimed, leaving the Defendants to recover what was due under the mortgage, by a fresh Suit. The arrears of Swatuntrum were disallowed on the ground that their value had not been satisfactorily proved.

4. The Defendants appealed.

5. The Civil Judge observed in his decree, that the Original Suit No. 101 of 1841, was instituted by the present Defendants, to establish their right under the Mortgaged Deed of 1827, to the six Hamlets in question; that a Razeenamah was executed in which Alinjepaukum was given up to the Plaintiffs, now Defendants, who instead of regularly filing it, put it in with a motion as evidence of their title; that the decree then passed adjudged the Hamlets to them, but the Suit having been remanded by the Sudder Udalut, in order that the claim of the mortgagees might be equitably adjusted, the Plaintiff withdrew the Suit, obviously with the view of retaining possession of the said Hamlet by falling back upon the Razeenamah; that the mortgage and Razeenamah were proved to be authentic deeds, and that consequently the question to be determined was simply, whether the present Defendants (then Plaintiffs) could fall back upon the said Razeenamah, or were bound to

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adjust their claims under the mortgage Deed with the Plaintiffs (then Defendants.)

6. The Defendants were only entitled, he considered to an adjustment, and he consequently decreed, that the Plaintiff upon paying his share of the principal of the mortgage, Rs. 171-5-9, into Court, should recover possession of his share of the said Hamlet: but he refused to give the Plaintiff's costs, as he had not paid the sum advanced in the mortgage into Court, or tendered payment to the Defendants.

7. In his application for the admission of a Special Appeal, the Special Appellant urged—

1st. That the Appeal Decree is erroneous, inasmuch as it sets aside a Razeenamah freely executed by the parties and the authenticity of which is fully admitted by the Civil Judge, and

2d. That the same is erroneous, inasmuch as it declares a single sharer in an undivided property competent to bring an action for his undefined share.

8. The Court of Sudder Udalut admitted a Special Appeal, in order that the two objections urged by the Special Appellant, against the decree of the Civil Judge, both of which involved a question of usage and practice, should be brought under the consideration of this Court.

9. The Court of Sudder Udalut observe that a decision in favor of the Special Appellant, upon the second of the above two points, would do away the necessity of recording any judgment upon the first of the points, as no such judgment could then be productive of results—they therefore pass on to the consideration of the second point.

10. In regard to this point the Court are clearly of opinion, that a co-sharer cannot individually sue for recovery of his share of a joint property, without reference to the other proprietors who have an united interest with him. In the present case, a mortgage bond is the subject of the Suit, and this was executed by the Special Respondent and six others, shareholders. The aim of the decree of the Appellate Court, is to give effect to a fraction of the bond in so far as respects one only of these joint executors thereof; such an award the Court of Sudder Udalut deem to be altogether illegal, and the Suit brought to obtain it an irregular one which should not have been entertained.

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No. 32 of 1852.

Decree dated 19th February 1853. *Page* 43 *M. V.*

1. The Original Suit was instituted against Special Appellant, (2nd Defendant) and another, for the recovery of Rupees 380-11-7, being balance of principal and interest alleged to be due under a Razeenamah filed between the 1st Defendant and Plaintiff in Suit No. 289 of 1846 on the Calicut Moonsiff's file.

2. The ground of action against the 2nd Defendant was that on the date of the said Razeenamah, he had by an entry made in Plaintiff's account book, guaranteed the fulfilment of the terms thereof.

3. The 2nd Defendant denied having given the said guarantee, and pleaded the terms of the Razeenamah as showing that the 1st Defendant was alone liable for the debt to which it related.

4. The Moofty Sudder Ameen was of opinion that the guarantee in question had been given, but as the occurrence thereof had not been made known at the time to the Court, he held, that under the Circular Order of the Sudder Udalut, No. 48, it could not be deemed valid or enforced, and hence dismissed the Suit.

5. From this decision the Plaintiff appealed to the Civil Judge, arguing for the validity of the said guarantee.

6. The Decree of the Sudder Ameen was reversed by the Civil Judge, that Officer concurring with the Sudder Ameen, as to the genuineness of the guarantee bond, but not considering its omission from the Razeenamah to be opposed to the Circular Order quoted by that Officer. The Civil Judge's Decree accordingly was, that unless 2nd Respondent could point out property of the 1st Defendant available for the liquidation of the debt, he must be held responsible for the same.

7. The 2nd Defendant having appealed specially to the Sudder Udalut, they admitted his Appeal in order that it should be decided before them, whether the fact that the alleged security entered into by the 2nd Defendant, (Special Appellant) for the 1st, was not at the time made a record of Court, vitiates the deed of security under the Circular Order

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of this Court, No. 48, and also how far the said omission bears against the integrity of the said deed, the execution of which has been denied by the Special Appellant.

8. The Special Respondents in their answer urge the following grounds, why the decree appealed against should be confirmed by the Court of Sudder Udalut.

1st. That a deed is not to be invalidated because not made a matter of record.

2nd. That the reason why the Special Appellant did not join in the Razeenamah, but bound himself for fulfilment of the terms thereof by a separate deed, was his fear lest he should be held jointly liable for other debts due by 1st Defendant, and that several other Suits were adjusted in the same way as the one brought by Special Respondent, in which the said Razeenamah had been given, by Special Appellant, having become responsible as in the present instance.

3rd. That the Circular order in question, applies only to the settlement of Suits by compromise and does not affect this case.

9. The Court of Sudder Udalut concur with the Civil Judge, in holding that their Circular Order No. 48, does not present any hindrance to the litigation of the Special Respondent's claim, the object of the said order being to prohibit the Courts from recognizing pleas raised in bar of execution of decrees, unless the facts on which such pleas rested had been communicated at the time of their occurrence to the Courts, but not to shut out parties from preferring any claims they might have to advance, founded upon distinct transactions entered into by them; but it appears to the Court of Sudder Udalut, that the present claim is not one that can be entertained, since it is based upon a matter which had been already brought in issue and decided upon by means of the Razeenamah filed by the Special Respondent and 1st Defendant, and that under the said Razeenamah the Special Appellant is entitled to be considered wholly absolved from liability in the said matter.

10. Upon this ground therefore the Court of Sudder Udalut, reverse the Decree of the Civil Judge and dismiss the Suit with all costs.

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No. 31 of 1852.

Decree dated 22nd February 1853. *Page* 45 *M. V.*

1. The Original Suit was instituted by the Special Respondents, against the Special Appellant and three others, for the recovery of 15 Mas and 14½ Goolies of Nunjah and Poonjah land, and a building ground, valued altogether at Rupees 59-15-0.

2. It was stated in the plaint, that the 1st Plaintiff's father and the husband of the 1st Defendant were undivided brothers; that the former died 25 years ago, upon which the latter took possession of the whole ancestral estate, namely ¼ caray of land and a manay, and maintained the Plaintiff; that upon 1st Defendant's husband's death, 15 years ago, her unmarried son succeeded to this property and died in 1837, during the Plaintiff's absence at the 2nd Plaintiff's mother's house, and that the 1st Defendant then made over the land to one Auroomoogatha Pillay, who paid the net profits to the 1st Defendant, by whom they were shared with the Plaintiffs.

3. The 1st Defendant in her answer, contended that her husband and the 1st Plaintiff's father, and another brother, and cousin, divided the said property between them forty years ago; that the cousin gave his $\frac{1}{16}$ share to his daughter the mother of the 2nd Defendant, who is now in possession; that the 3rd brother's share fell upon his death, to her own husband, who performed the last rites of the deceased, and that 1st Plaintiff's father's share was purchased by her husband twenty-eight years ago, for 15 Poons; that consequently, her husband in whose name the whole was registered in the survey account of Fusly 1239, died possessed of $\frac{3}{16}$ of the land and manay, which with merass registry fell, first to her son, and then to herself, and that in March 1847, she sold the whole to the 3d Defendant for Rupees 150.

4. The 2nd Defendant concurred in the above answer.

5. The 3rd Defendant urged that the sale to him alluded to by the 1st Defendant was made in liquidation of previous mortgages by her son and for Circar arrears.

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6. The 4th Defendant averred that he held 167 Goolies under a mortgage executed by the 1st Defendant, and that the Plaintiff's claim was good.

7. The District Moonsiff found that the land had been held successively by the 1st Defendant's husband, her son and herself; that the son had mortgaged parts of the same, as had also the 1st Defendant, and that the final sale was made in liquidation of these mortgages. He however was of opinion that the division between the parties and the sale by the 1st Plaintiff's father to which there was no written evidence, had not been satisfactorily proved, but that the sale by the ostensible managing member could not be disturbed, and he accordingly non-suited the Plaintiffs, leaving them at liberty to sue for their due share of the surplus over and above the former liens, received at the sale by the 1st Defendant.

9. The Subordinate Judge in his Decree reversing the Moonsiff's decision, observed, "this Suit has been very unnecessarily mystified by the "stress that has been laid upon the question, whether the family to which "the Plaintiffs and 1st Defendant belong, were divided, or undivided. "If there is one point more strongly laid down in Hindoo Law than "another, it is the limited power of a childless widow over property of "which she became possessed on the death of her husband—she is ex-"pressly declared to have only a life interest, and forbidden to alienate "it in any way. Her husband's next of kin, although the family may have "been divided, are declared to be heirs to the property on her death. "Under these circumstances, the Court feels precluded from recognizing "the deeds executed in favor of the 3rd Defendant by the 1st Defend-"ant, subsequent to the death of the son of the latter."

12. A Special Appeal was admitted by the Court of Sudder Udalut, on the ground that it is contrary to Hindoo Law to determine that under no circumstances whatever can a widow alienate or sell any portion of the property of which she became possessed on the death of her husband, and also to determine, if necessary, whether the family was, or was not, a divided one.

14. The Court of Sudder Udalut are of opinion, that the family in question has been proved to be a divided one.

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15. The circumstance admitted by the Original Plaintiff to exist, of the 1st Defendant, a female, on the death of her son, having been left in possession of the land, is almost, in the opinion of the Court, sufficient proof to the family being a divided one—but it has, the Court consider, been established by evidence that the family could not be otherwise than divided.

16. In no way has any connection been shown to have existed between the families of the Plaintiffs and Defendants, to lead to a conclusion opposite to the one which the Court has arrived at.

17. The Subordinate Judge has in his Decree, affirmed it to be a principle of Hindoo Law that a childless widow cannot under any circumstances alienate property to which she has succeeded as her husband's heir.

18. The Court of Sudder Udalut observe, that alienation by a widow of her deceased husband's property is allowed by the Hindoo Law, when such is rendered requisite for the payment of family debts or for her necessary subsistence.

19. In the present instance the Court find that when the 1st Defendant succeeded to the property in question, it was to a considerable extent mortgaged; that its value did not exceed Rupees 150, and that it was not until after a lapse of ten years, that from the pressure of debts and the difficulty of finding means for her support, that the sale objected to was effected by 1st Defendant to the 3rd Defendant.

20. Under the above circumstances, the Court of Sudder Udalut deem that the sale to the 3rd Defendant by the 1st Defendant was a good and legal one. The Decree of the District Moonsiff as respects the said sale is therefore confirmed, and the judgment of the Subordinate Judge reversed.

No. 9 of 1852.

Decree dated 3rd March 1853. *Page* 61 *M. V.*

1. The Original Suit was instituted by Chetumbra Chetty as Plaintiff (Respondent) to establish his right to succeed to the whole of his adop-

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tive father's estate, valued, including outstanding debts, at Rupees 40,876, against Meenatchee, and four other Defendants.

2. The Plaint stated that Tandava Moorty Chetty adopted the Plaintiff, his nephew, about 10 years ago, and that about three years after this adoption his first wife being dead, he married Meenatchee the 1st Defendant, and by her had a daughter who was between four and five years old at the institution of this Suit.

3. That Tandava Moorty Chetty died on the 11th May 1850, and that previous to his death, the Defendants combining together abstracted property to the value of 10,000 Rnpees, and also locked up the rooms containing the other property.

4. That the Defendants lodged an accusation against the Plaintiff's father of having destroyed a will executed in their favor by the said Tandava Moorty Chetty who died before the case was decided, and upon his death the 1st Defendant applied to the Court to be put in possession of the property left by the deceased according to a will stated to have been made in her favor.

5. By this will the Plaintiff is left only 3,000 Rupees, a tenth of the whole estate, the rest being left to the widow and her daughter.

6. The Plaintiff pleaded that this will was obtained by fraud during the insensibility which preceded the death of his adoptive father Tandava Moorty Chetty, and that this will could not be admitted as being opposed to the laws and customs of Hindoos.

7. The Civil Judge upon a careful consideration of the case was not of opinion that the will was fraudulently obtained, its attestation having been attended with sufficient publicity, and the persons attesting being respectable. The illness from which the deceased died not being of a nature to obscure his faculties, and the will being shown to have been executed ten days previous to his death, there is no reason to suppose that he was ignorant of its contents; under these circumstances the first plea of the plaintiff was rejected.

8. As regards the Hindoo Law of succession in this case, the Civil Judge referred to the Law Officers of the Court of Sudder Udalut, who decided that it was not valid, although the Plaintiff had in the opinion

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of the Civil Judge, failed to prove the abstraction of property by the Defendants, still the Civil Judge was of opinion that there was strong reason to suspect the 1st and 3d Defendants of having embezzled the property. The Civil Judge therefore in passing judgment for the Plaintiff decreed the 1st and 3rd Defendants to pay the whole of the costs.

9. Against this decision the 1st Defendant Meenatchy appealed upon the following grounds,—

1st. That the question had not been properly put to the Law Officers of the Court of Sudder Udalut, inasmuch as it had not been specially mentioned that the property bequeathed and divided, was not ancestral, but self-acquired property, and that therefore the decision of the Law Officers cannot be held to apply to this case, in which the property under dispute was self-acquired.

2nd. That according to the Hindoo Law, vide the 2nd Clause of the Dauya Bhaga of Jimuta Vahana, and Colebrooke, 2nd clause, Book V., Vol. 3, Strange 9th Chapter on Partition, it is perfectly lawful for a father to follow the course pursued by the Petitioner's late husband.

3rd. That the Judge in his Decree has only noticed the documents generally under the term "will," whereas there was a deed of partition or gift made previous to the will, of which this will was only a confirmation, and therefore the question mainly turns upon the power that a Hindoo may have to dispose of self-acquired property during his lifetime.

10. The Respondent in his answer denied the main ground of the Appellant's statement that the property in question was self-acquired, maintaining, that although the property left by the deceased had greatly increased, nevertheless, that, having its origin in ancestral property, the whole must be considered as of the same nature as the original property. Respondent also controverted the Hindoo Law quoted, by other quotations, showing that in a division of property women are only to be provided for as regards their maintenance and marriage; he further shows that the division document and confirmation will were not the one subsequent to the other, but executed at the same time; he also directs the attention of the Court to the fact that in a division, which

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to be legal, should (where such divisions are allowed) be equal, he has only had about a tenth share allowed to him.

11. Under these circumstances the Respondent prays the Court of Sudder Udalut will reject the above appeal, and that upon a consideration of the evidence regarding the abstraction of property, they will award the amount claimed before the Civil Judge but disallowed by him.

12. The Court of Sudder Udalut concur with the Civil Judge in deeming the documents produced by the Original Plaintiff to be honest ones proved to have been duly executed, and that in so far as the actual execution of the said documents affects the question at issue, they may be considered unexceptionable.

13. The property is alleged by the Appellant to be self-acquired, but by the Respondent to be ancestral. It is allowed by both parties that the Appellant's late husband had inherited a house, beyond which he had no ancestral property at the time of this inheritance.

14. The Court of Sudder Udalut are of opinion that the property in litigation is justly entitled to be considered as self-acquired. The circumstance of the Appellant's late husband having obtained a house upon the division of the family property with his brothers, does not in the opinion of the Court render, under Hindoo Law, all his subsequent acquisitions of real and personal property of the nature of ancestral property.

15. Deeming the property for these reasons to be self-acquired, and with a view of ascertaining how far property of this description would affect the Hindoo Law as applicable to the points at issue, reference was made to the Pundits of the Court by the following questions:—

1st Question to the Pundits of the Court of Sudder Udalut.

Can a Soodra during his lifetime execute a deed of division of his self-acquired property allotting a portion of it to his adopted son and the remainder of it to his wife and daughter? In addition to the aforesaid deed he executed a will re-capitulating the conditions of the said deed. Does the circumstance of the Soodra in question having inherited a house, which house forms a portion of the property given to the son in any way affect the point at issue? the son was adopted previous to the Soodra's marriage with the wife, and the birth of the daughter above alluded to.

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1st Answer by the Pundits of the Court Sudder Udalut.

A deed of divison of the kind mentioned in the question of the Court, cannot be executed, nor is a will made in accordance therewith valid, it being illegal by Hindoo Law that a deed of division should be executed allotting a share to a wife and a daughter in common with a son, insomuch as a wife and a daughter who have no right to property while a son is alive, are not capable of participating in the property together with a son.

2. If after giving the son his share the residue be given over to the wife and daughter out of affection, such affectionate gift will be valid, provided it embraces only personality, and not real property which during the lifetime of the son cannot be given away without his consent.

3. It is consistent with Hindoo Law that the house, a real estate which descended by inheritance, should form a portion of the property given to the son. This circumstance in no way affects the point at issue.

2nd Question to the Pundits of the Court of Sudder Udalut.

In the answer given by you to the 1st question put by the Court, you have stated that, if after giving the son his share, the residue be given over to the wife and daughter out of affection, such affectionate gift is valid if of personality, you are required to state the nature and extent of the share that by the Law it is necessary should be given to the son by his father, also in what manner the nature of such share is affected by the property being ancestral or self acquired.

If a gift to a widow and daughter consist of both real and personal property, does such circumstance destroy entirely the gift in question?

2nd Answer by the Pundits.

The Hindoo Law books "Vijnanaswareyan," &c. declare that a father who has acquired property by his own exertions is entitled on division to two-thirds thereof, and his son to one-third. Consequently one-third is the nature and extent of the share that should be given to the son by his father out of his (the father's) self-acquired property.

If the property be ancestral, the son will be entitled to one half of it, inasmuch as both the father and son must divide it in equal proportions.

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If after such division the father shall give away to his wife and daughter both real and personal property appertaining to his own share, such gifts will be valid inasmuch as his son has no longer any right to his share. If however in contradistinction to the above course, the father allots but a portion to his son according to his pleasure and gives away the remainder consisting both of real and personal property to his wife and daughter, such gifts to the wife and daughter will not be valid so far as it regards the real property inasmuch, as the said allotment to the son does not amount to a legal division between him and his father and the right of the son to the remainder of the property continues in force, but the gift to the said females as regards the personal property will be valid.

16. From the answers given by the Law Officers it will be seen that under the Hindoo Law, as respects his personal property, the act of Appellant's late husband was legal.

17. Having therefore a legal title thus to dispose of his property and the documents filed affording satisfactory proof that he did make to the Appellant and daughter a gift or allotment of a portion of his personal property,—the Court of Sudder Udalut resolve to amend the decree of the Civil Judge and award to the original Plaintiff (Respondent) the real property claimed by him, and adjudge to the Appellants the personal property given to her by the deeds executed in her favor by the Appellant's late husband.

No. 24 of 1853.

Decree dated 22nd March 1853. *Page* 89 *M. V.*

11. The Court of Sudder Udalut find that notice to appear and answer to the Appeal was issued to the Special Appellant at Chundregarry in the zillah of Mangalore, that return thereto was made that he was absent at Tellicherry, and that thereupon a proclamation for his attendance was affixed in Chundregarry.

12. This course the Court of Sudder Udalut have to observe was irregular, as under Sections II and III, Regulation II of 1811 on its ap-

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pearing that the Special Appellant was at Tellicherry, a notice should have been issued to be served upon him there, and resort to a proclamation should only have been had on its not being known where he was to be found.

No. 45 OF 1852.

DECREE DATED 29TH MARCH 1853. *Page* 91 *M. V.*

16. The Court of Sudder Udalut have to observe that the intent of Section VII, Regulation XXIX of 1802, is to provide that the succession to a vacant Curnumship shall devolve upon the heirs of the prior incumbent if found competent to discharge the duties of the office, and that failing them, the Zemindar may nominate thereto any other fit person he may choose. In the present instance the party coming forward to lay claim to the office as the heir of the former Curnum Mullaparaz is a minor, and as such, has obviously not capacity for the duties of the office.

17. It is pleaded that he may discharge these duties through a deputy, but for this the Regulation makes no provision. On the contrary it stipulates that the nominee shall himself be a person capable for the office, and it is obvious that the chief aim of the Regulation is not to make the office in question an hereditary one, but to prescribe rules for having it fitly filled up and the duties thereof efficiently discharged, consistently with which aim alone the claims of heirs to succeed thereto can be respected. The Regulation unquestionably gives them title to priority of nomination, but if themselves persons incompetent to the office, their title thereto becomes incomplete and lapses.

No. 1 OF 1852.

DECREE DATED 2ND APRIL 1853. *Page* 101 *M. V.*

15. It has been objected that interest should not be adjudged upon the Bond as the terms thereof make no provision for the same, and as the sum of the Bond is itself formed in part of interest.

16. The Court of Sudder Udalut consider both these objections to be

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unsustainable. The Bond provided for liquidation of the sum thereof by instalments, and as this condition was not kept, the charge of interest becomes fairly exactable. Nor does the circumstance that the sum of the Bond is composed of interest, prevent the exaction of such a charge, since this is plainly authorized by the very enactment (Section V, Regulation XXXIV of 1802) which Appellant quotes as sustaining his objection.

No. 25 of 1853.

Decree dated 4th April 1853. *Page* 101 *M. V.*

6. The Civil Judge appears to have disposed of the case, under the idea that all Pagodas which have been brought into use are vested in the public, and never in the builder or founder thereof. Herein the Court of Sudder Udalut deem that he lies under a mistake, it being clear to them that there are Pagodas, the right to which belongs to private individuals, as well as such as appertain to public Communities.

No. 10 of 1852.

Decree dated 23rd April 1853. *Page* 125 *M. V.*

1. The Original Suit was brought by the father of Amhaboyee against Special Appellant (1st Defendant) his cousin's son, and the widows (2nd and 3rd Defendants) of two other cousins, for the recovery of a moiety, valued at Rupees 680-3-3, of family property.

2. The Plaintiff admitted that a Deed had been executed between himself and the Defendants on the 19th March 1847, in which the property had been divided into three equal shares, one of which had been assigned to the Plaintiff, one to the 1st Defendant, and the remaining third to the 2nd and 3rd Defendants, but Plaintiff contended that the allotment of the share to the two latter Defendants was illegal, and that his signature to the deed had been obtained by misrepresentations.

3. The Defendants maintained the validity of the Deed, the 2nd and 3rd Defendants asserting that the property which they had thrown in

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at the division had been held separately by their late husbands, whose father had disconnected himself *with* the family, and had increased his inherited property by personal industry.

4. During the progress of the Suit, the Plaintiff and 1st Defendant on the 22nd March 1848 filed a motion stating that they had entered into a compromise, and were prepared to abide by an agreement executed in April of the same year, which provided for the equal division of the estate between them—maintenance being allowed to the 2nd and 3rd Defendants.

5. Before the Decree was passed, the Plaintiff died and his daughter Amhaboyee was allowed to conduct the Suit on behalf of herself and her sisters.

6. The Hindoo Sudder Ameen adjudged to the 2nd and 3rd Defendants a life interest in a third share of the family property under the deed of 19th March 1847; and further taking up the question whether Amhaboyee and her sister or 1st Defendant should succeed to the property of the deceased Plaintiff, decided in favour of the former, on the ground that the Deed of April 1848, and the motion of the following November, amounted to a complete division of interests between Plaintiff and 1st Defendant. The same Deed and Motion were also held as constituting an adjustment of the claims of Plaintiff and 1st Defendant against each other, *i. e.* as regarded the residue of the property after deduction of the share awarded to 2nd and 3rd Defendants.

7. The Supplemental Plaintiff, Amhaboyee, died after an appeal had been filed by the 1st Defendant; and the Assistant Judge, concurring in the view taken of the case by the Sudder Ameen, and being of opinion that Respondent, the husband of the deceased Supplemental Plaintiff, was her heir and the proper guardian of her sisters, dismissed the Appeal.

8. The Court of Sudder Udalut admitted a Special Appeal in order that it might be decided whether the Lower Courts had been right in the construction they had put upon the Deeds executed by the parties in litigation in 1847 and 1848, viz., that such Deeds constituted an actual division of the property; and also in order to pronounce upon the right of the 1st Defendant to succeed to the Original Plaintiff in the event of the property being held to have not been divided.

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9. In his answer, the Special Respondent contends, in opposition to pleas advanced by the Special Appellant, that the Deed of 1847 ought not to be considered void by the death of the Original Plaintiff before it was carried into effect; that the 1st Defendant's performance of the funeral rites of the Plaintiff gave him no rights in addition to those which he might independently possess, and that the succession of Amhaboyee and her husband, the Special Respondent, to the Original Plaintiff's property, was in strict accordance with the provisions of Hindoo Law.

10. In answer to a question put by the Court of Sudder Udalut to their Law Officers, it has been declared that the mere execution of a Deed to effect a division of family property does not suffice to constitute a division, and which can only be held to have taken place when the members of the family may have actually divided their property, each taking possession of his allotted share.

11. It is not pretended that any such actual division has occured in this instance, and whatever the intention of the parties in executing the Deeds of 1847-48, these Deeds, it is clear, under the above exposition of the Law, cannot be allowed the force of a division.

12. In the interval of the Suit, and while the family remained in its undivided state, as above defined, the Plaintiff demised without leaving male issue, and there being hence no one in a position to require the 1st Defendant (Special Appellant) to divide the property, the Court of Sudder Udalut reverse the Decrees of the Lower Courts, and dismiss the original claim with costs.

No. 75 of 1852.

Decree Dated 28th April 1853. *Page* 129 *M. V.*

1. The Original Suit was instituted to recover 4,016 corrotums of land, valued at Rs. 3,708, with Rupees 792-1-2 as produce of the same from 1834, in which year the said land was taken out of the possession of the Plaintiff, and made over to the Defendant under an award given by the Collector of Madura.

2. The Plaintiff contended that he had been in unquestioned possession of the said land up to 1822, when the Curnums of the Ramnad

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Zemindary, which was then under the Collector's management, charged him with usurping the same; that the various attempts made to adjust the matter terminated in the award above referred to, under which he was dispossessed.

3. The Acting Zillah Judge declared the award null and void, and after an exparte trial, decreed the land to the Plaintiff. The Sudder Udalut in their proceedings of the 3rd May 1841, concurred with the Court below in setting aside the award, but they directed that the case should be re-opened, and evidence received and heard from both parties—that which the Civil Judge had before him, viz. copies of the deposition taken by the Collector in the enquiry made by him in 1834, being deemed inadmissible.

No. 9 of 1853.

Decree dated 29th August 1853. *Page* 193 *M. V.*

1. The Original Suit in the Principal Sudder Ameen's Court was instituted by the Special Respondent, against the Special Appellant and three others, for the recovery of a building and ground at Conjeveram, which Plaintiff alleged had been sold to him by the 4th Defendant, as executor of the Will of the late Ramanadah Pundiah, the son of the 1st Defendant, and husband of the 2nd; Probate of the said Will having been granted by the Supreme Court at Madras, where the testator possessed other property.

3. The Principal Sudder Ameen disallowed the right of the 4th Defendant to sell the Premises, and decreed that the 4th Defendant should repay to the Plaintiff the purchase money, viz. 1,000 Rupees.

4. From this Decree, the 4th Defendant appealed to the Civil Court, and the Suit having been remanded for re-investigation, a revised Decree was passed by the Acting Principal Sudder Ameen dismissing Plaintiff's claim with costs, with reference to the provision in Pundiah's Will in 1st Defendant's favor.

5. An Appeal having been preferred by the Plaintiff, the Civil Judge decided, both with reference to oral evidence as well as a document

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produced by 1st Defendant as the Will of her late husband Pundiah's father, that the said 1st Defendant had never acquired any right or title to the premises in dispute, and that the assertion to the contrary in Pundiah's Will was evidently false and fraudulent, and made with a view to prevent the sale of the property in satisfaction of his debts. The Civil Judge accordingly awarded the premises in dispute to Plaintiff, and assessed the 1st Defendant with all costs.

6. On the application of the 1st Defendant in the Original Suit, the Court of Sudder Udalut admitted the case to a special hearing on the ground that the title under which the Plaintiff preferred his claim, was apparently of doubtful validity, it seeming to the Court that under the provision of Section XIV. Act XX of 1841, the Probate granted by the Supreme Court gave the 4th Defendant authority to recover debts only, and not to sell real property.

12. From a perusal of the record of this case, the Court of Sudder Udalut are satisfied that the late 4th Defendant sold the property in dispute as the executor to the estate of the late Ramanadha Pundiah, acting under the Probate granted to him by the Supreme Court of Madras.

13. The point therefore for decision is whether the 4th Defendant by virtue of the said Probate could convey to the Plaintiff a good title to the property to which the latter lays claim.

14. The Court of Sudder Udalut are clearly of opinion that he could not. The Probate in question vested the late 4th Defendant with no right to act beyond the jurisdiction of the Supreme Court, further than that under the provisions of Section XIV, Act XX of 1841, it empowered him to recover debts.

No. 41 of 1853.

Decree dated 3rd September 1853. *Page* 199 *M. V.*

1. The Original Suit was brought by Plaintiff in the Court of the Moonsiff of Chilkaloorpaud to recover from the Defendant, the step son of her deceased husband, Rupees. 60, arrears of maintenance for 15 months, and also Rupees 4 per month as maintenance for the future.

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4. In his Decree, confirmed by the Civil Judge on Appeal, the Moonsiff disallowed the arrears sued for, but, in accordance with the opinion delivered by the Mahomedan law officer of the Zillah Court of Guntoor, decreed that the Defendant should pay 1 Rupee per month to the Plaintiff for her maintenance.

5. The Court of Sudder Udalut admitted a Special Appeal from these Decrees, with a view to the determination of the question whether the Lower Courts had not erred in their application of the Law to the state of facts before them; and having personally consulted with their Law Officer on the point, and inspected the authorities he has referred them to, they are satisfied that there is no provision of the Mahomedan Law requiring that an individual should maintain his widowed step mother, there being between the two no tie of consanguinity to call for such act of maintenance.

6. They resolve therefore to reverse the Decrees of the Lower Courts and to dismiss the Suit with costs.

No. 88 of 1853.

Decree dated 6th October 1853. *Page* 225 *M. V.*

3. The Court of Sudder Udalut observe that the decision of the Sub-Collector in this case was based upon the reports made to him by the Tahsildar by whom the matter at issue was investigated, and was therefore altogether invalid as a decision under the provisions of Regulation V of 1822, which clearly contemplates that the investigations held under it shall be conducted by the officer by whom the decision is passed. The Suit before the Subordinate Court, though virtually an Appeal from the Sub-Collector's decision, was brought by the Plaintiff in the form of an Original Suit, and was entertained as such by the Subordinate Judge. Under these circumstances, the Court of Sudder Udalut have deemed it proper to treat the Suit in the Subordinate Court as an Original Suit, and having admitted a Special Appeal, resolve to remit to the Special Appellant the stamp duty incurred by him in coming before this Court erroneously in Special Appeal, and to allow him one month for filing a regular Appeal before the Civil Court from the Decree of the Subordinate Court calculated from the day that this Decree may reach the Civil Court.

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No. 55 of 1853.

Decree dated 15th October 1853. *Page* 231 *M. V.*

1. The Original Suit was instituted to compel the Defendants to remove two idols which they had set up in a certain spot, and to restrain them from erecting in future any temple in honor of the said idols: a sum of money was also claimed as personal damages which the Plaintiffs alleged that they had sustained in consequence of the Defendants' acts.

2. In defence, it was contended that the Defendants possessed the right of erectiug a temple upon their own ground and placing the idols therein for public worship.

3. The Moofty Sudder Ameen decreed both injunctions prayed for by the Plaintiffs, leaving the Defendants at liberty to set up the said idols in their respective houses as household idols. He disallowed the money claim set up, on the ground that it had not been shown that the Plaintiffs had suffered either loss or degradation.

4. On Appeal, this decision was reversed by the Acting Civil Judge, who was of opinion that the Defendants were at full liberty to erect on their own ground a temple for any idol they might choose to worship. He adjudged the costs in both Suits to be borne by the respective parties, with the exception of the fees on the amount of compensation sued for, but disallowed.

6. The Court of Sudder Udalut having ruled in their Decree in Appeal No. 1 of 1839, that institution of public worship by one of two rival sects in innovation of prevailing usage should not be permitted, deemed it proper, with reference to the present case to propound the followiug questions for the opinion of the Pundits :—

1st. Can the Vadagala Vishnavas in a village erect a Pagoda for the purpose of publicly worshipping the image of their Saint Vadanda Charry within the limits in which it has been customary for the antagonestic sect of Tengala Vaishnavites to carry in procession the image of their Pagoda ?

2nd. Is a distinction made in such a case as that now referred between public and private worship, and if no worship by the Vadagala

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Vaishnavaites has hitherto been practised, would they, by usage, be prohibited from erecting a Pagoda in the village, and establishing therein public worship?

7. To the foregoing questions the Pundits replied, that it would be contrary to custom to allow a Pagoda to be erected by the Vadagala Vaishnavites, even upon their own ground, if such an erection was against the feelings generally of the people of the village—but that there is a marked distinction made in Hindoo Law between private and public worship, and that the prohibition above alluded to would not extend to the private worship of the Vadagala idol in the respective houses of the members of that sect. The public worship of this idol not being customary in the village is, they observe, a sufficient reason for the prohibition of the establishment of such public worship there now.

8. The Pundits founded their opinion on the following passage in the preamble of the Metachsara descriptive of cases not to be entertained by a king; "All cases prejudicial to the feelings of the Mahazumns or people of a town or village shall not be received."

9. With reference to the foregoing opinion, the Court of Sudder Udalut admitted the Special Appeal prayed for, and on perusal of the record are of opinion, that the Decree of the Acting Civil Judge is erroneous and must be reversed.

10. The Acting Civil Judge appears to have looked upon the Defendants, who are members of the Vadagala sect, as dissenters from the Plaintiffs' sect, which is that of the Tungalas; and on the ground that liberty of conscience should be allowed them, has refused to grant the interdict for which the Plaintiffs have prayed.

11. His view of the respective parties does not appear to the Court of Sudder Udalut to be an accurate one, the fact being that the two are in a position of rivalry or antagonism towards each other, rather than in that simply of dissent; and the question is, whether the one is to be permitted to invade the privileges of the other. So far as relates to the use of processions, the Acting Civil Judge would seem to have recognized that the practice on the part of the Defendants within the range of the processions of the Plaintiffs would be an invasion,—this having been prohibited by him; and herein the Decree of the Acting Civil Judge

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appears to the Court to involve an inconsistency, since it allows of the erection of a temple, but excludes a material portion of the ceremonies of a temple.

12. The Decree of the Sudder Udalut in Appeal No. 1 of 1839, has respect to the same question which is now in issue, only that the interdict then sought for was by the Vadagalas against the Tungalas; and on that occasion the Court granted the interdict on the ground that the setting up of public worship by the one sect within the precincts of the temple of the other, was an invasion of right.

13. The Pundits of the Sudder Udalut have been appealed to in respect of the matter of the present Suit, and have declared that the Plaintiffs are entitled to the interdict they ask for.

14. The Court of Sudder Udalut resolve therefore to Decree that the Defendants be prohibited erecting a temple or instituting public worship on the spot of ground objected to by the plaintiffs, and which lies within the range of their temple.

No. 53 of 1853.

DECREE DATED 16TH OCTOBER 1853. *Page 234, M. V.*

1. The Original Suit was instituted by the Plaintiff (Special Appellant,) against the Defendants for balance of principal and interest due on a Bond alleged to have been executed by the 2nd Defendant during the 1st Defendant's minority.

3. The Sudder Ameen gave judgment in the Plaintiff's favor, according to his plaint.

4. The Civil Judge in Appeal modified this decision,-disallowing the interest which the Plaintiff had claimed, as the Bond was in discharge of former debts, and included interest on which further interest could not be charged.

6. The grounds upon which interest was disallowed by the Civil Judge did not appear to the Court of Sudder Udalut valid, since Section V, Regulation XXXIV. of 1802, manifestly allows of interest being charged upon Bonds, such as that upon which the Petitioner claimed,

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wherein interest due upon prior obligations has been incorporated in the sum of the Bond.

7. The Court therefore admitted a Special Appeal, with the view of passing judgment upon the above point.

8. The Court of Sudder Udalut, having before them the record of the case, consider the Civil Judge to have been in error in refusing the Plaintiff's interest on his Bond, on the ground that the Bond itself embraced interest upon former transactions, since Section V, Regulation XXXIV of 1802, in prohibiting the allowance of compound interest, makes a special reservation that this shall not bar the award of interest on consolidated Bonds of the description now in question. The Court find, morever, that this Bond does not present the features attributed to it by the Civil Judge, for it is specified therein, that all interest on the previous loans had been remitted, the Bond being simply for the consolidated principal remaining due. The Civil Judge's refusal to the Plaintiff of interest can thus in no respect be upheld.

9. The Court of Sudder Udalut consequently set aside the Decree of the Civil Judge, in so far as it interferes with the judgment of the Sudder Ameen, whose decision they affirm.

No. 91 of 1853.

Decree dated 17th October 1853. *Page* 236, *M. V.*

1. This is a Special Appeal from the Decree of the Subordinate Judge of Rajahmundry in Original Suit No. 119 of 1849, reversing a decision passed by the Collector of Rajahmundry, under Regulation V of 1822, upon a claim preferred by the Special Respondent, who was Plaintiff before the Collector and also before the Subordinate Court, to certain land of which he alleged that he had been forcibly dispossessed by the Special Appellant and the other Defendants.

2. The Subordinate Judge decided that the Plaintiff (Special Respondent,) was entitled to the land claimed, and awarded it to him together with past produce.

3. The Court of Sudder Udalut observe that the Collector in his

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decision has passed judgment upon the title of the respective parties to the land referred to, instead of confining himself to the question of forcible dispossession, upon which alone it was competent to him to decide.

4. The Collector's decision is also invalid, from being based upon the reports of two of his native subordinates, in lieu of upon proceedings held before himself as the Regulation contemplates.

5. The Suit before the Subordinate Court, which is virtually an appeal against the Collector's decision, has been brought by the Plaintiff (Special Respondent,) in the form of an Original Suit; and under these circumstances the Court of Sudder Udalut having admitted a Special Appeal, resolve to remit to the Special Appellant the Stamp duty incurred by him in coming before this Court erroneously in Special Appeal, and to allow him one month for filing a regular Appeal before the Civil Court, from the Decree of the Subordinate Court, calculated from the day that this Decree may reach the Civil Court.

No. 34 of 1853.

Decree dated 22nd October 1853. *Page* 237, *M. V.*

1. The Original Suit was instituted by the Special Appellant on behalf of herself and her adopted son to establish her claim, in virtue of an alleged rule of hereditary succession, to be invested with the Office of Huckdar of the Coonatoor Chuttrum, held by her late husband. She further claimed from the Defendant (the Collector of the District) the amount of the emoluments of the office, for the period during which it had been withheld from her.

2. The Subordinate Judge, considering the hereditary nature of the office, to have been proved, gave judgment for the Plaintiff; but disallowed half the emoluments claimed, on the ground that the duties had been performed by another party, during the period for which they were demanded.

3. The Civil Judge in Appeal reversed the above decision, it being his opinion that whatever might have been the original character of the tenure, it had not been hereditary since 1802 at which date the Govern-

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ment had challenged and negatived such hereditary right, and Plaintiff's late husband submitted to its dictum, thenceforth holding office as a paid Superintendent, as appointed by the Officers of Government, liable to dismissal, and possessing no guarantee that the Office should descend to his heirs. The Civil Judge considered that under such circumstances the supercession of the Petitioner and her son was authorized by Sections XI and XII, Regulation VII of 1817.

4. On the application of the Plaintiff, the Court of Sudder Udalut admitted a Special Appeal, for the purpose of determining whether the Civil Judge was justified in the construction put by him upon the Collector's act in 1802, relative to the office sued for, that it showed the office not to be hereditary, and in thereby dismissing the Suit.

5. The Court of Sudder Udalut are of opinion, that the Civil Judge has taken an erroneous view of the measures adopted by the Collector in 1802, in respect of the appointment of Huckdar now in question, in considering that they manifested that the Collector treated the office as not being an hereditary one.

6. The Court, it would appear, finding that the Plaintiff's husband and other Huckdars had usurped the Chuttrum property under their control as their own, declared them to be simply superintendents and not Proprietors, appointed them salaries, and intimated to them that they would be dismissed if guilty of fault. There is nothing in this position, the Court of Sudder Udalut have to observe, in which the Plaintiff's husband stood, to negative the plea that he held his office by hereditary tenure. It is in fact just that of every Meerassee office holder, these having their fixed emoluments and being liable to dismissal, though on vacancies occurring, their immediate heirs have title to succeed them.

7. The assignment to Plaintiff by the Collector of half the emoluments of the office on the death of her husband, appears to the Court of Sudder Udalut to be significant of the nature of the tenure. The arrangement was declaredly made, because Plaintiff's sex precluded her succeeding to the office, and the Court can in no way account for such an appropriation of the funds of a public charity but upon the presumption that the office was recognized as an hereditary one, and the widow of the late incumbent deemed to have a title to be supported out of the proceeds of it.

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No. 28 of 1853.

Decree dated 29th October 1853. *Page* 243, *M. V.*

1. The Original Suit was instituted by one Iyasawmy Taven and four others, before the Moofty Sudder Ameen of Combaconum, against the Special Appellants, and 42 other Defendants, to recover for the 5th Plaintiff 30 Pungoos of land said to have been sold to him by the four first Plaintiffs, but which had been previously mortgaged for Rs. 4,100 to the father of the 1st and 2d Defendants, by the 1st and 2d Plaintiffs and by certain of the Defendants the mortgage deed stipulating that the mortgage should not be redeemed for the space of four years, but that, after that time, the land might be resumed in the month of Auny of any year on the payment of the sum lent, and that in the meantime it was to be enjoyed with all its appurtenances by the mortgagee who was to pay the Circar kist.

2. The Plaintiffs alleged that the usufruct of the land which had been enjoyed by the 1st and 2nd Defendants since the death of their father had not only covered the interest of the mortgage, but had produced a large surplus in favor of the Proprietors, and that in consequence of the 1st and 2nd Defendants having refused to restore their shares according to the terms of the mortgage Bond, and to receive the balance of the mortgage amount due upon them, and unless the collective body of their co-parceners applied to them to do so, they, the Plaintiffs, were compelled to institute the present Suit to obtain the redemption of the land, in order that the sale made in favor of the 5th Plaintiff might be carried out.

3. The 1st and 2nd Defendants (Special Appellants) who alone defended the Suit, averred that a Bill of Sale for the lands sued for had been executed in their favor by the first four Plaintiffs for the sum of Rs. 3,333-5-4, and that after deducting the sum of Rs. 1,366-10-8 on account of the previous mortgage, the sum of Rupees 1,966-10-8 was, on that occasion, paid to the Plaintiffs in cash.

4. The Plaintiffs in their reply denied the execution of the Bill of Sale pleaded by the Defendants.

5. The Moofty Sudder Ameen was of opinion that the Deed of Sale

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alleged by the Defendants to have been executed by the Plaintiffs in their favor, was fully proved, and dismissed the Plaintiffs' claim.

6. The Assistant Judge, who tried the Suit in Appeal, decided that the Deed of Sale produced by the Defendants was a forgery, and decreed that the 1st and 2nd Defendants should restore to the Plaintiffs (Appellants) the land sued for, and that they (the 1st and 2nd Defendants) should bear the whole costs of Suit, both in Original and Appeal; further that they should pay to the Plaintiffs 1 to 4, the value of the mesne profits of the land at the rate of 7½ per cent, on Rupees 3,333-5-4, the price, the 1st and 2nd Defendants alleged, that they had paid for the land.

7. The Assistant Judge decided that the mortgage amount had been cleared by the surplus produce of the land enjoyed by the Defendants. He concurred with the Moofty Sudder Ameen in rejecting the Deed of Sale alleged by the 1st four Plaintiffs to have been executed by them in favor of the 5th Plaintiff.

8. An application for the admission of a Special Appeal having been presented to the Court of Sudder Udalut by the 1st and 2nd Defendants (Respondents in Appeal Suit) the Court of Sudder Udalut were of opinion that the Decree of the Assistant Judge, by which he had awarded to four, out of many Proprietors, by whom the mortgage had been jointly executed, their shares of the land so mortgaged was open to question, as opposed to the nature of the deed.

9. The Court further observed that the arguments used by the Assistant Judge as justifying him in setting aside the decision of the Sudder Ameen in respect to the validity of Special Appellants' Deed of Sale are not such as satisfy the Court that his view of the case is the correct one.

10. For the determination of the above two points a Special Appeal therefore was admitted.

11. On a deliberate consideration of the two points connected with this Suit, reserved for adjudication before them, the Court of Sudder Udalut are of opinion that matter does not arise out of them calling for reversal of the Decree of the Assistant Judge.

12. In regard to the first of these points it is clear, the Court have to observe, that, taken as a general question, it is not open to

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parties to a deed, such as that sued upon, to pursue rights in respect of a part only of the property held bound under the deed. Here the Plaintiffs from 1 to 4 and others had joined in the mortgage of 90 Pungoos of land, while the said Plaintiffs come forward without their co-mortgagers to effect redemption of but 30 of the said Pungoos, these being claimed by them as their individual share—judged of simply upon this view of the case, the Suit could not stand; but the Court find that by the Act of the mortgagees, the 1st and 2d Defendants, they have made it impractable that the mortgage deed can be maintained or dealt with in its integrity. This arises from the mortgagees having ceased to treat with the mortgagers collectively, and entered into transactions with certain of them individually, in making purchase outright of portions of the mortgaged land. They allege that they have so purchased the whole 90 Pungoos, 30 by a deed pleaded in this Suit, 30 by one pleaded in Appeal No. 29 of 1853, and the remaining 30 by eight distinct deeds. The two former of these deeds have been contested, and pronounced by the Assistant Judge to be undeserving of credit. The remaining eight have not been objected to, although the parties thereto have been included in these Suits; and it is in respect of these eight deeds and the 30 Pungoos embraced therein, that the Court of Sudder Udalut hold that the mortgagees have vitiated the integrity of the mortgage deed, rendering it no longer possible that the deed can be maintained as consolidating the interest of the parties to it. It is not denied that the 30 Pungoos now sued for are the individual share of the Plantiffs, from 1 to 4; and the Court of Sudder Udalut are of opinion that the position in which matters have been placed by the act of the mortgagees, as above described, warrants the giving an award for these particular Pungoos, without respect to the remainder of the land included in the mortgage deed.

No. 31 of 1853.

Decree dated 5th November 1853. *Page 254, M. V.*

1. The Original Suit was instituted by the Special Appellant before the District Moonsiff of Rayaveram, for the recovery from the Defendant of Rupees 133-8-0, the alleged value of certain jewels which had formed a portion of the Plantiff's dowry, and had been taken possession

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of by her deceased husband, and by the Defendant, her husband's brother, as member of an undivided family.

4. The District Moonsiff was of opinion that the Defendant, as heir to his brother's property, was, according to the Hindoo Law, liable to restore to the Plaintiff the jewels specified in the Plaint, which he considered were proved to have been disposed of by her husband. He accordingly decreed that the Defendant should make over to the Plaintiff the ornaments, &c. in question, or pay to her the sum of Rupees 111-4-0, the revised valuation of the ornaments with costs thereon.

5. The Principal Sudder Ameen of Vizagapatam in Appeal reversed that portion of the Original decision which awarded to the Plaintiff the value of the 4 ornaments given by her to her husband, he being of opinion that her claim thereto was untenable, inasmuch as the proceeds of the jewels were applied to the discharge of debts. He however confirmed the remainder of the Decree in her favor for Rupees 11-12-0 with costs thereon.

6 In support of her application for the admission of a Special Appeal, the Special Appellant urged, that the Principal Sudder Ameen before passing his decision should have obtained the opinion of the Pundits, with reference to the provisions of Section XVI, Regulation III of 1802, as to the legality of the disposal of the Plaintiff's dowry in the liquidation of the debts of the family ; and the Appeal Decree being contrary to the provisions of the Hindoo Law, a Special Appeal should be admitted.

7 It appeared to the Court of Sudder Udalut that the Decree of the Principal Sudder Ameen in this case reversing that of the District Moonsiff was opposed to the Hindoo Law, in so far as that Law secures to a wife the right of having restitution made to her by her husband, or his heirs, of her dowry or any portion of the same, which, even with her consent, may have been taken from her, save under certain circumstances under which her claim to restitution is bar red.

8 The Court of Sudder Udalut accordingly admitted a Special Appeal in this case, and to enable them to dispose of the point set-forth in the above Certificate, propounded the following questions to their Hindoo Law Officers :

"Can a man, under the Hindoo Law, dispose of ornaments given to his wife as her dowry ? If so, under what circumstances ?"

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Should the wife consent to her husband's so disposing of her property for the redemption of the family lands under mortgage, would she under the Hindoo Law be entitled after her husband's death, to recover from the family estate the value of the property so disposed of ?

To the foregoing questions, the Pundits replied that under the provisions of the Hindoo Law, a man cannot dispose of his wife's ornaments given as dowry, even by himself, but under certain circumstances, such as famine, &c. he is allowed to take them, according to the text of Yagnavuleya, which says : "a husband is not liable to make good the property of his wife taken by him in a famine, or for the performance of a duty, or during illness, or while under restraint."

" If the wife consented to her husband's disposing of her property in " view to the redemption of the family lands under mortgage, still she " would be entitled, before or after the death of her husband, to recover " the value of the property so disposed of, without interest—provided " there be property available for the purpose."

9 The Court of Sudder Udalut in accordance with the above exposition of the Hindoo Law, as applicable to the claim of the Special Appellant, reverse the Decree passed by the Principal Sudder Ameen, and confirm the Decree passed by the District Moonsiff.

No. 74 of 1853.

Decree dated 12th November 1853. *Page* 261, *M. V.*

1. The Original Suit was instituted by the Plaintiffs for the recovery of certain Meerassee land attached to a Pagoda, and for a sum of Rupees 792-4-6, the amount of kist and produce alleged to have been appropriated by the Defendants.

2. The 1st and 2nd Plaintiffs claimed as the widow and daughter of Ramanoojah Charry, the deceased holder who was alleged in the Plaint to have derived his title from his adoption by one Teeroovengada Charry a former holder of the Meerassee, whom he succeeded. The Plaintiffs represented that the 2nd Defendant had been employed by the 1st Plaintiff as her Agent, and that combining with the other Defendants he wrongfully excluded her from her Meerassee.

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3. The 1st, 2nd, and 3rd Defendants alleged that the title of Plaintiff's husband to the Meerassee was derived, not by adoption, but by inheritance, and that at his death the 1st and 2nd Defendants, his nephews, were entitled to inherit.

4. The Original Decree of the Moofty Sudder Ameen allowing the Plaintiff's claim and decreeing as sued for, was alleged, on Summary Appeal, to have been found on insufficient investigation, and the Suit was remanded by the Civil Judge; and in a fresh Decree the Moofty Sudder Ameen dismissed the Plaintiff's claim with costs.

5. The Civil Judge on Appeal discredited the additional evidence upon which the revised Decree of the Sudder Ameen was founded, and reversed that Decree with costs.

6. On the application of the 1st Defendant, the Court of Sudder Udalut admitted a Special Appeal, and remanded the Suit for the purpose of determining whether a Meerassee with duties of the nature attached to it, was capable or not of being inherited by females.

7. In his revised Decree confirmed by the Civil Judge in Appeal, the Sudder Ameen declared that by the Hindoo Law the Meerassee in question was not inheritable by females, and rejected the Plaintiff's claim with costs. This confirmatory Appeal Decree of the Civil Judge was based on an opinion of the Pundits of the Court of Sudder Udalut, who, in answer to a question put to them by the Civil Judge, declared that a Meerassee like that in question must pass to the Male Dayâdees of the deceased.

9. The Court of Sudder Udalut admitted a Special Appeal to enable them to determine,

1st. Whether the opinion delivered by their Pundits contained a sound exposition of the Law.

2nd. Whether the question proposed to the Law Officers was not defective, in omitting to state whether the Defendants stood in the relation of Sapinda Dayâdees to the adoptive father of 1st Plaintiff's husband.

* * *

11. The Pundits of the Sudder Udalut, who were in attendance at the hearing of this cause before the Court, have explained that there is no text under which they have given their opinion that a female is disquali-

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fied from succeeding to a Meerassee such as in issue, but that usage and the nature of the Meerassee have governed them in coming to this conclusion.

12. They further explain that an Architta Meerassee, which is the species of Meerassee involved in Suit No. 111 of 1846, on the file of the Hindoo Sudder Ameen referred to by the Civil Judge, and a Poorohita Meerassee, also instanced by the Civil Judge, may descend to a female and the functions thereof be performed by deputy. The present Meerassee styled Achariar Pooroosha, they observe, involves higher functions than appertain to those above specified, and which debar the office to which they attach from coming under the influence or disposal of a female.

13. This opinion of their Pundits, the Court of Sudder Udalut see no reason for distrusting, and they therefore resolve to adopt it.

14. The 1st Plaintiff being found thus to be entirely disqualified from holding right over the office in question, the Court are of opinion that although it may be possible that the Defendants obtained their occupancy thereof from her, it is not open to them to decree that she shall be under any circumstances placed in possession of the right.

15. The Court of Sudder Udalut accordingly affirm the Decree of the Civil Judge, and dismiss the Appeal with costs.

No. 56 of 1853.

Decree dated 24th December 1853. *Page* 291, *M. V.*

1. The Original Suit was laid before the District Moonsiff of Combaconum, to recover from the Defendants, one-eighth Karai of land. The Plaintiff derived his title from an alleged sale by a deceased cousin of the Defendants, and sued upon a deed of sale executed by him.

2 The Defendants did not question the title of their cousin to sell, nor did they dispute the execution by them of the deed of sale. Their defence was, that it had been obtained without consideration, and that the alleged dealings upon which it was based were fictitious, and that the deed was void, as having been fraudulently obtained from a sick man, upon his death-bed.

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3. The Acting Moonsiff dismissed the Plaintiff's claim, on the ground that there had been no consideration for the deed.

4. The Civil Judge on Appeal, confirmed the Moonsiff's Decree, being of opinion, that a deed of sale executed without a consideration, was void, although a deed of gift, would, by Hindoo law, be valid.

5. Application was made for the admission of a Special Appeal, on the ground, that as Iyoovien's power to sell was undisputed, a deed executed by him even in the manner set-forth by the Defendants, could only be disturbed by showing incompetency on the part of Iyoovien, or fraud on that of the Special Appellant.

6. The Court of Sudder Udalut admitted a Special Appeal, being of opinion, that the Civil Judge had erred in deciding that a deed executed with the full intention of the party selling, was necessarily void, because not given for a valuable consideration, although no fraud or mistake was alleged.

8. The Court of Sudder Udalut consider that the Lower Courts have been clearly in error, in disallowing Plaintiff's title to the land in issue, on the ground that no consideration was given by him for it. It appears indubitably to have been the intention of Iyoovien, the owner of the land, to assign it to Plaintiff, and the form of deed to which he resorted for the purpose, namely, a deed of sale with fictitious consideration, in lieu of a deed of gift, which he might have executed, should not, in the opinion of the Court, vitiate his intention.

9. The Court of Sudder Udalut resolve, consequently, to reverse the Decrees of the Lower Courts, and to adjudge the said land to the Plaintiff, together with the produce for which he has sued, and his costs.

No. 42 of 1853.

DECREE DATED 31ST DECEMBER 1853. *Page* 303, *M. V.*

1. The Original Suit No. 192 of 1848, on the file of the District Moonsiff of Paupanassam, was brought by the Special Appellant as Plaintiff, to recover certain land valued at Rupees 71-8-0 on payment to the Defendant of Rupees 365-8-11, the amount for which the land sued for had been mortgaged to the latter.

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2. It was stated in the Plaint that the land in question had been mortgaged by the late owner to the Defendant in 1831, but that the widow of the former, by name Ammaloo Ummal, who inherited her husband's property was induced on her death-bed, 25th June 1843, to execute a codicil to her will, in which she constituted the Plaintiff her sole heir, to the effect that it was her wish that the said land should be made over to the Defendant on a Bill of Sale, on account of the mortgage amount, and of a further loan advanced by the Defendant to her late husband.

3. The Plaintiff asserted that the codicil in question was obtained from Ammaloo Ummal by violence during her last moments, that such an alienation of the property was not valid; and that he, as heir to the estate, was entitled to redeem the land on payment of the mortgage.

4. The Defendant denied that the execution of the codicil had been unfairly obtained, and alleged that the transfer of the land to him under a Deed of Sale, had always been contemplated both by Ammaloo Ummal and her husband.

5. The District Moonsiff dismissed the Plaintiff's claim observing that since the death of Ammaloo Ummal, the Plaintiff was proved to have recognized, in two different Deeds, the validity of the codicil executed by her. The District Moonsiff assessed the parties with their respective costs.

6. The Subordinate Judge of Combaconum who tried the Suit in Appeal confirmed the Original Decree, except in regard to costs with the whole of which he assessed the Appellant, (Plaintiff) both in Original and Appeal.

8. The Court of Sudder Udalut observed, that the Lower Courts in their Decree had viewed an intention to transfer the proprietary right over the land in dispute to the Defendant, as having the force of a deed conferring the said title on him, and questioning the legality of such a decision, they admitted a Special Appeal.

9. Upon a full consideration of the merits of this case, the Court of Sudder Udalut consider that up to the penning of the concluding clause of the Will, the 2½ Pungoos in question were viewed by the Testatrix Ammaloo Ummal, as held by the Special Respondent under mortgage,

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liable to redemption, for, in bequeathing this and other property to the Special Appellant, she particularized that he had to pay off this mortgage.

10. The question then is, can an expression of wish or intention, such as conveyed in this last clause, which (under an evident change of mind on the part of Ammaloo Ummal) enjoins it on the Special Appellant to give the Special Respondent a Deed of Sale of the land, be binding upon him.

11. The Court of Sudder Udalut are not of opinion that such an expression of intention would have been binding upon Ammaloo Ummal herself; she might make such a promise, and then decline fulfilling it, and the party in whose favor the promise had been made, could not compel her by legal action to fulfill it. A mere promise, it is clear, does not carry with it the force of a fulfilled act, else deeds in completion of acts would be unheeded, and mere promises might be pleaded for titles.

12. The promise being written certainly affords evidence of its having been made, but the act of so recording it, does not give the promise itself any more force than if it had been simply verbally made.

13. Such then was the posture in which the Special Respondent's title stood, as between him and Ammaloo Ummal. He had her expressed intention, that the land should be conveyed to him by Deed of Sale. But if such promise would not have been binding on Ammaloo Ummal, it follows she could not make it binding upon another. She might indeed have laid the Special Appellant under a compulsion to fulfill her wishes, by making his succession to the inheritance dependant upon his carrying them out, so that she might have had either to give effect thereto or to throw up the inheritance. But this she did not do; she bequeathed him the inheritance unshackled by consideration, and superadded this expression of wish.

14. The two further Deeds, documents 4 and 5 (executed to other parties) in which the Special Appellant is represented to have expressed the same intention in Special Respondent's favor as Ammaloo Ummal had done, have obviously to be construed similarly to the clause in question in the Will. They express mere intention, not having the binding force of a fulfilled act, and are not even promises made to the party who was to benefit thereby.

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15. The Court of Sudder Udalut, therefore, resolve to reverse the Decrees of the Lower Courts, and to award the land in issue to the Special Appellant on his clearing off the amount of the mortgage Rupees 365-8-11.

1854.

No. 81 of 1853.

Decree dated 14th January, 1854. *Page 3, M. V.*

1. This is an Appeal from a decision passed by a Court of Requests at Secunderabad, on the 16th April 1853, in a Suit instituted by the Respondent for the recovery from the Appellant of certain jewels, valued at Rs. 300,000.

4. The Court of Requests, on the 18th March 1853, decided that the Defendant was not amenable to their jurisdiction, and accordingly nonsuited the Plaintiff.

5. The same Court was afterwards re-assembled under instructions from the Brigadier for the purpose of receiving evidence from the Plaintiff in proof of the Defendant's amenability, and a fresh decision was passed on the 31st March 1853, declaring that the Defendant was not subject to the jurisdiction of the Court.

6. The case was then a second time remanded to another Court, which on the 16th April 1853, passed a Decree in favor of the Plaintiff, awarding to him the sum sued for.

7. The Appellant, in her Appeal, repeats the objections urged by her in the Original Suit, to the jurisdiction of the Court of Requests, and further contends that the Proceedings held on the case subsequent to the Original decision of the Court of Requests, passed on the 18th March 1853, were illegal, the Suit having been brought for a sum exceeding Rupees 200, under the provisions of Section XVII, Act XI of 1841, which provides that in such cases an Appeal shall lie to the Court of Sudder Udalut, but does not authorize a remand by the Officer Commanding the Station, as is allowed in cases by Section XI of the same enactment when the amount of the claim is less than Rupees 200.

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8. On perusal of the record, the Court of Sudder Udalut are of opinion that the Proceedings of the Court in which the Decree under Appeal was passed were illegal, and that the Decree must consequently be reversed.

9. The case appears to have been twice remanded by the Brigadier Commanding the Hyderabad Subsidiary Force at Secunderabad, for revision of judgment, once to the Court of Requests originally assembled for the trial of the cause, and once to another Court similarly constituted for the purpose.

10. These Proceedings seem to have been held under Section XI, Act XI of 1841, which enactment, however, the Court of Sudder Udalut have to notice, distinctly permits of but one such remand; and the second remand, upon which the Decree appealed against was obtained, was therefore illegal.

11. In addition to the objection which thus attaches to the second remand, the Court of Sudder Udalut have to observe that the Section above quoted was not applicable to the case. The power of remand is allowed under this Section in respect of cases for value not exceeding Rupees 200, the dissatisfied party having no right of Appeal in such cases, and a remand for rectification of judgment being authorized, to allow of error of judgment, where apparent to the Commanding Officer, being remedied. But cases beyond the above value, such as the present one, have to be dealt with under Section XVII of the said Act, wherein an Appeal to the Sudder Udalut is the remedy provided for any error of judgment which a Court of Requests disposing thereof may have committed, and the remand by the Commanding Officer is neither called for, nor authorized.

12. This opinion of the bearings of Sections XI and XII of the said Act are, it is to be observed, in conformity with the Decree already given by this Court on the question, in Appeal No. 59 of 1848.

13. Under the above view of the Law, the Court of Sudder Udalut resolve to set aside the Decree appealed against as an illegal one, and to declare that originally passed by the first Court of Requests on the 18th March 1853, to be in force, as the only valid decision which has been given in the case.

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No. 72 of 1853.

Decree dated 17th January 1854. *Page* 5, *M. V.*

1. The Original Suit was instituted by the Special Appellants, as the head men of the three castes of Brahmins, Moodelliars and Chetties inhabiting the village of Moottoopettah in Tanjore, to recover from the Defendants (Special Respondents) 1 valy and 10 maws of land in the said village valued at Rupees 60, which, it was alleged, had been for many years used by the villagers as a burning and burial ground, and also as a place for grazing cattle, but had recently been enclosed by the 1st and 3rd Defendants.

3. The District Moonsiff decreed in favor of the Plaintiffs, considering it proved that up to within 10 months previous to the institution of the Suit, the land sued for had been used for the purpose specified in the Plaint.

4. In Appeal, this decision was reversed by the Acting Subordinate Judge, who declared the land to be the property of the Pagoda of which the 4th and 5th Defendants were the Punchayets, and dismissed the Plaintiffs' claim with costs. The Acting Subordinate Judge observed in his Decree, that " though the parties who had had the management of the Pagoda had allowed the land to be waste for many years, and though it was undeniable that part of the land now enclosed by the 1st Appellant (Defendant) had been used as a place both for burying and burning bodies, the claim of the Pagoda to the enjoyment and usufruct of the land had all along been recognized, and it could not be equitably considered to have lapsed, merely because it might have been used for the purpose specified in the Plaint."

5. On the application of the Special Appellants, the Court of Sudder Udalut admitted a Special Appeal, having previously ascertained from their Law Officers that ground once accorded as a place for burning and burying the dead cannot be resumed, and turned to the ordinary use of cultivation.

7. In accordance with the opinion pronounced by the Hindoo Law Officers of the Sudder Udalut, which the Court see no reason to question, and from which it appears that the fact of the land under litigation

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having been used for a considerable period by those whom the Plaintiffs represent, as a burial and burning ground, with the acquiescence of the Trustees of the Pagoda to which it is said to have belonged, precludes the latter from exercising any right over it so as to turn it to another purpose, the Court of Sudder Udalut resolve to reverse the Decree of the late Acting Subordinate Judge, and to affirm that of the District Moonsiff. The costs before the Acting Subordinate Judge and the Sudder Udalut are to be discharged by the 1st, 4th and 5th Defendants, who promoted the Appeal from the District Moonsiff's Decree.

No. 95 of 1853.

Decree dated 7th February 1854. *Page* 12, *M. V.*

1. Under the provisions of Regulation XXXIV of 1802, the Plaintiff in the Original Suit sought to recover certain land mortgaged to the Special Appellant in 1826, for Rupees 202-3-7, on the ground that principal and interest had been more than realized from the mesne profits.

3. The Moofty Sudder Ameen was of opinion that the profits had amounted to Rupees 88-6-7, over and above interest, and he directed the land to be made over to Plaintiff, on payment of the balance of the principal, viz. Rupees 113-13-0.

4. Defendant appealed, and the Civil Judge, adopting a different calculation, considered the profits to have amounted to rather more than double the principal. He therefore adjudged the disputed property to Plaintiff unconditionally, and assessed Defendant with all costs.

8. A Special Appeal was admitted, as it appeared to the Court of Sudder Udalut, that the Civil Judge has erred in his construction of Sections IV and VIII of Regulation XXXIV of 1802, as applied to this case.

11. Upon a perusal of the record, the Court of Sudder Udalut are of opinion, that the Civil Judge has misconstrued Sections IV and VIII, Regulation XXXIV of 1802, in bringing to account against the mortgagee the yearly amount of usufruct he has received during the term that he has had possession of the land in issue. The sum of the mortgage money is Rupees 202-3-7, and the annual value of the usufruct, as

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calculated by the Civil Judge, Rupees 20. The usufruct has therefore not exceeded the legal interest of the mortgage money, and the Defendant consequently was entitled to appropriate it year by year on account of interest for any number of years, that he might be left in possession. It is only, the Court have to observe, where interest may have "accumulated" in account that the sum thereof can be limited to that of the principal, pursuant to Section IV above referred to.

12. The Court of Sudder Udalut resolve therefore to reverse the Decree of the Civil Judge, and to amend that of the Moofty Sudder Ameen, by declaring that Plaintiff shall be entitled to take possession of the land sued for, only on discharging the sum of the mortgage thereon namely, Rupees 202-3-7.

No. 13 of 1854.

Decree dated 16th February 1854. *Page* 14, *M. V.*

1. The Original Suit was instituted by the Special Respondents to recover from the Special Appellant and another, certain land valued at Rupees 73-12-0, together with arrears of Swamybogum alleged to be due thereon for a period of five years, amounting to Rupees 75, the land in question having been inherited from his maternal grandfather, Sreenevassa Iyengar, by the Plaintiff's father, and having been leased by the former to the 1st Defendant's father-in-law on the 31st July 1837, and the rent due on it having been paid up to 1844.

4. Numerous documents were filed by both parties in support of their respective pleas; and the Principal Sudder Ameen, considering the evidence to preponderate in favor of the 1st Defendant, dismissed the Plaintiff's claim with costs.

5. The Plaintiffs having appealed, the Civil Judge reversed the Principal Sudder Ameen's Decree, on the ground that the circumstance of the land in dispute having been registered in the name of the Plaintiff's ancestor, Sreenevassa Iyengar, whereas no registry of it had been made by the Respondents or their ancestors, afforded weight, to the Appellant's claim, the evidence in other respects being equally balanced.

7. The 1st Defendant (Special Appellant) it is found has been long in possession of the land in issue, and it is alleged on the part of the Plain-

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tiffs that she holds it from them under lease. Of the existence of such lease, the Civil Judge was not satisfied; and, under these circumstances, he should have confirmed the Decree of the Principal Sudder Ameen, it being clear that the circumstance of a revenue registry does not suffice of itself, to afford proof or disproof of title to property. In this instance, the fact of the registry was the more equivocal, as it remained in the name of a party long deceased.

8. The Court of Sudder Udalut resolve therefore to reverse the Decree of the Civil Judge, and to dismiss the Suit with costs.

No. 98 of 1853.

Decree dated 7th March 1854. *Page* 21, *M. V.*

1. The Original Suit was instituted by one Iyahcunno Venody, to recover from the Special Appellant and four other Defendants, the sum of Rs. 43-4-0; which he alleged had been paid by him partly in cash, and partly in cloths, &c. to the 1st and 2d Defendants, in consideration of a promise made by them in connexion with the other Defendants, that one Mundi, the grand-daughter of the 1st and 2d Defendants, should be given in marriage to the Plaintiff's nephew, but which promise they had failed to perform.

3. The District Moonsiff non-suited the Plaintiff on the ground that he had no jurisdiction in the Suit; two of the Defendants, the 3d and 5th, being resident in the Puttoocottah Zemindary.

4. In Appeal, the Acting Principal Sudder Ameen decided that the District Moonsiff had jurisdiction in the case—the 3d and 5th Defendants having been resident within his jurisdiction when the cause of action arose. He accordingly tried the Suit on its merits, and considering the Plaintiff's claim established by the evidence, with the exception of one item of two Rupees value, he awarded to the Plaintiff the remainder of the sum sued for with costs.

5. The Court of Sudder Udalut consider the Acting Principal Sudder Ameen to have been in error, in holding that the place where parties may have been residing when a cause of action arose, was to determine jurisdiction before a District Moonsiff; whereas Clause First, Section XI, Regulation VI of 1816 makes the jurisdiction depend upon their being

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actually inhabitants of the Moonsiff's jurisdiction when a Suit against them may be instituted before the Moonsiff.

6. The District Moonsiff, the Court have to observe, was also in error in deeming his jurisdiction barred by certain of the Defendants, namely, the 3d and 5th, residing outside his limits, as the other Defendants it appeared lived within them—a circumstance which brought the Suit and all parties associated therewith under the Moonsiff's jurisdiction.

7. The Court of Sudder Udalut have further to notice that the Acting Principal Sudder Ameen erred when he came to the conclusion that the merits of the case should be pronounced upon, in not remanding the Suit for the purpose, to the Court of Original jurisdiction. As however the evidence in the case was duly taken by the latter tribunal, and as no good end could be served by remanding the Suit thereto, now that the Appellate Court has given judgment in the case, the Court of Sudder Udalut refrain from making such remand.

8. The Court of Sudder Udalut, therefore, do not deem it proper to interfere with the Decree of the Acting Principal Sudder Ameen, and dismiss the Appeal with costs.

No. 12 of 1854.

Decree dated 15th May 1854. *Page* 51, *M. V.*

1. This is an Appeal from a decision passed by a Court of Requests at Secunderabad on the 18th March 1853, in a Suit instituted by the Appellant, under the provisions of Section XVII, Act XI of 1841, for the recovery from the Respondent of certain jewels valued at 3,00,000.

4. The Court of Requests on the 18th March 1853 decided that the Defendant was not amenable to their jurisdiction, and accordingly nonsuited the Plaintiff.

5. The same Court was afterwards re-assembled under instructions from the Brigadier, for the purpose of receiving evidence from the Plaintiff in proof of the Defendant's amenability, and a fresh decision was passed on the 31st March 1853, declaring that the Defendant was not subject to the jurisdiction of the Court.

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6. The case was then a second time remanded to another Court, which on the 16th April 1853, passed a Decree in favor of the Plaintiff, awarding to him the sum sued for.

7. From this Decree the Defendant preferred an Appeal to the Court of Sudder Udalut, repeating the objections urged by her in the Original Suit to the jurisdiction of the Court of Requests, and further contending that the proceedings held on the case subsequent to the original decision of the Court of Requests passed on the 18th March 1853 were illegal, the Suit having been brought for a sum exceeding Rupees 200 under the provisions of Section XVII, Act XI of 1841, which provides that in such cases an Appeal shall lie to the Court of Sudder Udalut, but does not authorize a remand by the Officer Commanding the Station, as is allowed in cases by Section XI of the same enactment when the amount of the claim is less than Rupees 200.

8. On perusal of the Record, the Court of Sudder Udalut were of opinion, that the proceedings of the Court in which the Decree under Appeal was passed were illegal, and they accordingly reversed the Decree on the following grounds.

9. " The case appears to have been twice remanded by the Brigadier " Commanding the Hyderabad Subsidiary Force at Secunderabad, for " revision of judgment, once to the Court of Requests originally as- " sembled for the trial of the cause, and once to another Court similarly " constituted for the purpose."

10. " These proceedings seem to have been held under Section XI, " Act XI of 1841, which enactment, however, the Court of Sudder " Udalut have to notice, distinctly permits of but one such remand; and " the second remand, upon which the decree appealed against was obtain- " ed, was therefore illegal."

11. " In addition to the objection which thus attaches to the second " remand, the Court of Sudder Udalut have to observe, that the Section " above quoted was not applicable to the case. The power of remand is " allowed under this section in respect of cases for value not exceeding " Rupees 200, the dissatisfied party having no right of Appeal in such " cases, and a remand for rectification of judgment being authorized, to " allow of error of judgment, where apparent to the Commanding Officer,

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"being remedied. But cases beyond the above value, such as the present "one, have to be dealt with under Section XVII of the said Act, where- "in an Appeal to the Sudder Udalut is the remedy provided for any error "of judgment which a Court of Requests, disposing thereof, may have "committed, and the remand by the Commanding Officer is neither call- "ed for, nor authorized."

12. "This opinion of the bearings of Sections XI and XII of the "said Act is, it is to be observed, in conformity with the Decree already "given by this Court on the question in Appeal No. 59 of 1848."

13. "Under the above view of the law, the Court of Sudder Udalut "resolve to set aside the Decree appealed against as an illegal one, and "to declare that originally passed by the first Court of Requests on the "18th March 1853, to be in force, as the only valid decision which has "been given in the case."

9. The proceedings of the second and third Courts of Requests held in this matter having been thus set aside, the Planitiff now appeals from the decision of the 1st Court, dated 18th March 1853, which has been pronounced by the Court of Sudder Udalut to be in force, and which decided that the Defendant was not amenable to their jurisdiction.

10. The Appellant submits that the said Decree of the Court of Requests is erroneous, inasmuch as the Defendant was at the time the Suit was instituted and the award given, amenable to the jurisdiction of the Court as a camp follower, and as a person liable to the Articles of War for the Native forces in the Service of the East India Company; and further that the said Defendant, as a person residing within the limits of the Cantonment at Secunderabad, under the terms of Act XI of 1841, was subject during her residence there, to the jurisdiction of a Military Court of Requests at Secunderabad, and to no other Court, in all personal actions; and he therefore prays that the Decree pronouncing her not to be so amenable may be reversed, and that a final judgment may be given awarding to him the jewels sued for.

12. On full consideration of the record of this case and of the arguments urged on both sides, the Court of Sudder Udalut concur in the judgment of the Court of Requests that the Defendant is not amenable to their jurisdiction. Her residence in the cantonment of Secunderabad

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did not suffice to render her liable to be sued before the Court of Requests, as she was not "carrying on any trade or business" in the bazar, she is therefore, not embraced by Section II, Act XI of 1841. Neither do the Court look upon her as a camp follower, a designation which they conceive to belong only to such persons as are attached to a camp, in some fixed capacity, for the service of the camp, and entitling them to a place in the camp, and not to extend to adventitious and unrecognized followers. The Defendant had no such standing, and therefore is not comprehended by Section II, Act XII of 1842.

No. 47 of 1854.

Decree dated 20th July 1854. *Page* 69, *M. V.*

16. The Court of Sudder Udalut observe that it is informal that a Petition should be filed by a Plaintiff to withdraw a Suit, after decree has been passed therein, the proper course being for the parties to file a Razeenamah.

No. 8 of 1854.

Decree dated 9th August 1854. *Page* 81, *M. V.*

1. The Original Suit was instituted by the Plaintiff (Special Appellant) to establish his claim to the office of Goorookul in the Pagoda of Mookteeswarasamy, in the Village of Mogalikkoody, and to certain property belonging to the said Pagoda, and to obtain an injunction directing that a certain door therein should be opened.

2. The Defendants having failed to appear, the Original Suit was tried ex-parte, and a Decree passed in favor of the Plaintiff, awarding to him the office and a portion of the property sued for.

3. On appeal to the Civil Court the Suit was remanded for review of Judgment, and a revised Decree was passed dismissing the Plaintiff's claim with costs—the Principal Sudder Ameen deciding that the Defendants were entitled to remove the Plaintiff from his office of Goorookul for misconduct, and that such misconduct on his part had been proved, and that the lands sued for had been merely rented by him.

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5. On consideration of the attaché No. 79, and the grounds assigned by the Principal Sudder Ameen for holding that the Plaintiff had been justly dismissed for offence committed from his Meerassee office of Gooroo-kul in the Pagoda in question, the Court of Sudder Udalut were of opinion that there was reason to doubt whether the Plaintiff had been guilty of such fault or faults as would suffice to justify his dismissal, the error particularized in the attaché being one of a trivial nature, and the other matters set forth to his prejudice in the Principal Sudder Ameen's Decree appearing to depend upon vague statements and not upon clearly ascertained facts.

6. The Court of Sudder Udalut, therefore, admitted a Special Appeal, with the view of determining whether the Plaintiff had been justly dismissed from his office.

7. On perusal of the record, the Court of Sudder Udalut consider the Decree of the Civil Judge to be based upon a wrong principle. The Civil Judge has held that, although the Plaintiff's office of Goorookul may be an hereditary one, the Dhurmakurtahs or managers of the Pagoda are empowered to dismiss him therefrom without being responsible for their reasons for so doing; whereas, such hereditary office can only be forfeited by proved misconduct, the incumbent being at liberty to appeal to a Civil Court to uphold his Meerassee right if unduly interfered with.

8. The Principal Sudder Ameen has recognized the Plaintiff's Meerassee right to the office in question, but he has been of opinion that he has been justly deprived thereof, for offence committed. He adverts to proof of such offence appearing in document No. 79. The said offence consists in the Plaintiff having, on one occasion, neglected to obtain permission for the performance of a certain ceremony. This the Court of Sudder Udalut do not view to be an instance of misconduct such as to disqualify the Plaintiff for the office. The matter was furthermore passed over by the Dhurmakurtahs who allowed the Plaintiff to continue in office from February, when it occurred, to June. The other matter brought against the Plaintiff is that, on two occasions, he appropriated small quantities of grain and oil offered to the idol. This accusation does not appear to have been made when the Plaintiff laid a complaint before the Head of Police founded on his having been turned out of his office, and the document G shows that, subsequently to these alleged acts, the

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parties came to an amicable settlement. In the default thus of any established instance of serious misconduct on the part of the Plaintiff, the Court of Sudder Udalut are of opinion that he has not forfeited his Meerassee tenure of office. They resolve, therefore, to overrule the Decrees of the lower Courts, and to direct that it be restored to him.

No. 20 of 1854.

Decree dated 16th August 1854. *Page* 88, *M. V.*

1. The Original Suit was instituted by the Special Appellant for the recovery of a house valued at Rs. 50, alleged to have been purchased by him from the 1st and 2nd Defendants, and to have been mortgaged by them to the 3rd Defendant who refused to deliver it to him (Special Appellant.)

2. The District Moonsiff dismissed the claim, on the ground that the sale of the house by the 1st and 2nd Defendants was invalid, as having been made when they were out of possession, and before satisfying the claim of the 3rd Defendant to whom it had been mortgaged.

3. This decision was confirmed by the Principal Sudder Ameen in Appeal.

4. The Court of Sudder Udalut admitted a Special Appeal on the ground that the reason given by the Lower Courts for declaring the Plaintiff's Bill of Sale invalid was inconclusive, since the said deed might take effect after the expiration of the term of the Defendants' mortgage.

5. On perusal of the Record, the Court of Sudder Udalut are of opinion that the Lower Courts have erred in rejecting the Plaintiff's claim to the land in issue, because of the existence of the 3rd Defendant's mortgage thereon. The Plaintiff has by purchase taken the position of the Original Proprietor, and obviously may act as he was entitled to do by clearing off the mortgage when the time limited for this may arrive.

6. The Lower Courts have found the period for which the mortgage was to run to be ten years calculated from the 29th January 1846. The Court of Sudder Udalut, in reversal of their Decrees, decree that, when

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the said period may have expired, the Plaintiff may take possession on discharging the said mortgage.

No. 62 of 1854.

Decree dated 11th September 1854. *Page* 108, *M. V.*

1. The Original Suit, No. 522 of 1850, was brought before the District Moonsiff of Paramagoody by the Special Appellants to recover from the Special Respondent and others a sum of Rupees 366-1-9, being the Melivarum or Proprietor's share on certain lands belonging to the village of Areyakudi which had been cultivated in Fusly 1258, but it was alleged, had been collusively omitted to be entered in the accounts furnished to the Zemindar, the 2nd Special Appellant. The Plaintiff also prayed that the 1st and 2nd Defendants might be removed from the office of Curnum and ousted from the possession of the Maniem lands attached thereto.

6. The District Moonsiff decreed that the whole of the Defendants from 1 to 82 should make good the amount claimed by the Plaintiffs—that the 1st and 2nd Defendants should be dismissed from the office of Curnum, and that the Maniem lands attached thereto should be placed at the disposal of the Zemindar.

7. Aganist this Decree the 2nd Defendant (Special Respondent) appealed to the Subordinate Judge, who reversed so much of the Original Decree as adjudged the dismissal of, and payment of damages by, the Curnums, (1st and 2nd Defendants), on the ground that a Suit of this nature was not cognizable by the District Moonsiff :—Section V. Regulation XXIX of 1802, as explained by the Sudder Udalut in their Circular Order of the 2nd September 1830, B. and in para. 10 of their proceedings of the 4th March 1844, restricting the jurisdiction over Curnums in Zemindaries to the Subordinate Court.

8. The Special Appellants pray for the admission of a Special Appeal from this decision, on the grounds first, that the objection taken by the Subordinate Judge, on the score of want of jurisdiction, is opposed to the spirit of the Regulations and practice of the Courts : and secondly,

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that the Subordinate Judge is under a misapprehension in claiming exclusive jurisdiction under Section V. Regulation XXIX of 1802, as explained by Circular Order, 2nd September 1830, B. and Extract Proceedings 4th March 1844.

9. The Court of Sudder Udalut observe that the enactment above quoted prescribes that Curnums of permanently assessed tenures shall not be dismissed from their office, except by the sentence of a Court of Judicature; the Courts of the District Moonsiffs are clearly Courts of Judicature, and Suits of the description in question not having been excepted from their jurisdiction by Section XII, Regulation VI of 1816, there is ground to conclude that such Suits are cognizable by them. They resolve, therefore, to remand this case to the Subordinate Judge in order that he may pass a decision on the conduct and liabilities of the 1st and 2nd Defendants and on the Plaintiff's prayer that they be dismissed from the office of Curnum.

No. 9 of 1854.

Decree dated 20th September 1854. *Page* 117, *M. V.*

1. The Original Suit was instituted by the Special Appellant to establish his claim to certain lands yielding an annual produce of Rupees 63-14-8, as the adopted son of the 1st Defendant.

4. The Mooftee Sudder Ameen decided that the adoption was proved by the evidence adduced, and awarded to the Plaintiff the lands sued for, holding him responsible for the maintenance of the 1st Defendant.

5. In Appeal the Civil Judge reversed the Original Decree, observing that if any adoption really took place it was shown by a Razeenamah executed by the Plaintiff and filed as document B. to have been a conditional one.

6. Entertaining this view of the case, and considering that the Plaintiff was shown to have forfeited the condition of the adoption, the Civil Judge reversed the Original Decree with costs.

7. The Court of Sudder Udalut admitted a Special Appeal on the ground that the Civil Judge had assigned no reasons for rejecting the

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evidence to the genuineness of the deed of adoption sued on beyond the remark that it was unsatisfactory, and that the deed in question, if genuine, could not be invalidated by the subsequent Razeenamah upon which the Civil Judge had based his decision, that the adoption if it took place was merely a conditional one.

9. The Court of Sudder Udalut observe that the Civil Judge in viewing Plaintiff's document A as a deed of conditional adoption, the condition being that the Plaintiff was to render obedience to his adoptive mother, the Defendant has construed the deed by the Defendant's document B. bearing date four years and a half subsequently. The deed of adoption itself contains no such condition, nor can there be a conditional adoption. The act of adoption to stand at all must be a completed and conclusive one putting the adopted son in the exact position of a begotten son. The Pundits of the Court of Sudder Udalut having been questioned on the subject, state that such a document as B. is null and void, it not being practicable to shake the force of an adoption by creating any conditions such as it contains.

10. The Defendant admits the fact of the adoption, and the Court of Sudder Udalut resolve, therefore, to reverse the Civil Judge's Decree and to affirm that passed by the Sudder Ameen.

No. 14 of 1854.

Decree dated 27th September 1854. *Page* 125, *M. F.*

1. The Original Suit was instituted for the redemption of ¾ Vullum of Poonja land annually producing Rupees 30, which Plaintiff alleged that he and his uncle had mortgaged to the elder brother of Defendants, who died in 1829. The period fixed for the redemption was stated to have been, after a lapse of 10 years, extended for two years by a supplementary agreement executed in 1820 by Defendant's elder brother and stipulating for the surrender of the land at the expiration of that time.

3. The District Moonsiff decreed as sued for, and upon the suit being remanded for further investigation, adhered to his Original Decree.

4. The Defendants appealed from the Decree reiterating that the transaction between their elder brother and Plaintiff was a sale and not

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a mortgage, and urging that the truth of their plea, that the land has passed to them under a deed of sale duly executed, received strong confirmation from their undisturbed possession and the entry of the Puttien in their name.

5. The Principal Sudder Ameen remarked that admitting the validity of the document extending the period of possession which Plaintiff alleged to have been executed by the deceased elder brother of Defendants, the cause of action arose in 1830, and that the Suit instituted in 1843 was barred by the Regulation of Limitations.

6. He therefore reversed the Original Decree, and directed that the land, for the redemption of which the Suit was laid, and which had been put in Plaintiff's possession upon his giving security, should be restored to Defendants. He further decreed that each party should bear his own costs.

7. The Court of Sudder Udalut admitted a Special Appeal for the purpose of determining whether the Appellate Court had properly considered that the Plaintiff's claim was barred by the Regulation of Limitations.

9. The Court of Sudder Udalut are of opinion that the Principal Sudder Ameen erred in dismissing the Suit as barred by the Statute of Limitation. The suit is founded on a mortgage, and claims of this kind are specially exempted from the operation of the Statute.

No. 60 OF 1854.

DECREE DATED 4TH OCTOBER 1854. *Page* 136, *M. V.*

1. In the Original Suit the Plaintiff (Special Appellant) sued for the recovery of certain Bullahs of land, yielding annually Rupees 139-6-6, a well valued at Rupees 120 and 16 Palmyra trees of the annual value of Rupees 16, and further for the sum of Rupees 40, paid by him in the year 1848 on account of kist due for the said land, to Government.

2. The Plaint set forth that the land sued for was part of certain land granted on lease by Plaintiff's father on 22nd May 1813, to 1st

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Defendant's father and another, and renewed by himself on 3rd June 1818, after his (Plaintiff's) father's death, that the 2nd, 3rd and 4th Defendants had on his (Plaintiff's) requiring them to do so, given up to him Nos. 61 and 63, but had failed to give him possession of the remaining three pieces of land Nos. 59, 36, and 60. He sought to obtain possession of these, together with the well and palmyra trees aforesaid, of which latter, however, no mention was made in the exhibits A. and B. alleged to be the leases of the land in question.

3. The Principal Sudder Ameen decreed in Plaintiff's favor but without costs, observing that it was established that Plaintiff's father had sunk a well on the land in question—that the execution of the documents A. and B. was proved by the witnesses of both parties, that 1st Defendant's exhibit T. went to show that he held the land and well in question on lease, and that neither 1st Defendant nor his late father would for so many years have neglected to have the land entered in their name, had it been really their property.

5. The Civil Judge in his Appeal Decree reversed that of the Lower Court, observing that the Principal Sudder Ameen had laid too much stress on the fact of the puttah being in the name of the Plaintiff, which circumstance afforded merely collateral and not conclusive proof of proprietary right. The Civil Judge was of opinion that much doubt existed as to the genuineness of the counterpart leases exhibits A. and B. filed by the Plaintiff, the tenor of which was moreover at variance with his (Plaintiff's) own statement in his deposition before the Tahsildar in 1848, to the effect that he had himself occupied the land in question 25 years ago, and only since then gave it on lease to the Defendants.

7. The Court of Sudder Udalut admitted a Special Appeal from this Appeal Decree, being of opinion that the Civil Judge in reversing the Original Decree, had not given due weight to certain facts appearing in support of the Plaintiff's (Special Appellant's) title.

8. " The Puttah for the land in question" they observed, " has for " the last forty years stood in the name of the Plaintiff and of his father. " The 1st Defendant has been cognizant of this fact, and his explanation " of the circumstances under which this registration was originally made,

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" appears to the Court of Sudder Udalut a very unsatisfactory one, while " the continuance of the said registry for so many years and the transfer " thereof from the father's name to that of the son on the death of " Plaintiff's father, are wholly unaccounted for."

9. The Court of Sudder Udalut having taken the matter of this Special Appeal into consideration, are of opinion that the land sued for being the property of Government, and the Puttahs issued being in the name of the Plaintiff, the 1st Defendant can have no right to possession, but under the Plaintiff.

10. They find moreover that in the Razeenamah exhibit T of 1st Defendant entered into between the parties in 1848 regarding the land now in dispute the Plaintiff's (Special Appellant's) position as Puttahdar was acquiesced in by the 1st Defendant, while the Defendants' continuance in occupancy was permitted under the Plaintiff's consent.

11. The Court of Sudder Udalut resolve consequently to reverse the Decree of the Civil Judge and to affirm that of the Principal Sudder Ameen.

No. 71 of 1854.

Decree dated 9th October, 1854. *Page* 139, *M. V.*

1. The Original Suit before the Cauzee of Kurnool, was instituted by the Special Appellant for the recovery of Rupees 63-8-2, being the loss sustained by him in consequence of the Defendants having illegally retained in their possession a bandy and certain Cholum which had been mortgaged to them only as security for a certain loan advanced by them to the Plaintiff.

3. The Cauzee decreed in favor of the Plaintiff, for Rupees 48-11-4, on the ground that the Plaintiff had proved his assertions. The Defendants, he observed, had received the benefit of letting out the bandy for daily hire.

4. Upon Appeal the Agent to the Governor reversed this decision both upon the merits of the case, and because the Agent was of opinion, that the Cauzee had exceeded his powers in taking cognizance of a Suit for

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damages without orders, he being prohibited from so doing under Clause I. Section XII, Regulation VI of 1816.

6. The Court consider that the Agent has been in error in deciding that the Suit was excluded by Clause I, Section XII, Regulation VI of 1816, from the Cauzee's jurisdiction, the claim being one for pecuniary and not for personal damages.

No. 3 of 1854.

Decree dated 18th October, 1854. *Page* 153, *M. V.*

1. The Original Suit was instituted by the mother (since deceased) of the Special Respondent, to recover from the Defendant (Special Appellant) and another, possession of certain land valued at Rs. 215-11-9, together with a sum of Rupees 84-4-0, being the estimated profits from the said land for the years 1846 and 1847, and it was further sought that the Meerassy of a portion of the said land which had been irregularly registered in the name of the 2nd Defendant, might be transferred to that of the Plaintiff.

2. The Original Plaint stated that part of the land sought was that portion of the family estate which, when a division took place fell to the share of Plaintiff's husband's father and after his death was jointly enjoyed by her (Plaintiff's) husband and his elder brother, and that the remainder of the land was acquired by her (Plaintiff's) husband during his lifetime; that after both her husband and her brother-in-law had died, she (Plaintiff) and her sister-in-law, being unable themselves, to manage this landed property, obtained the assistance of the Defendants—their deceased husband's divided cousins, who arranged for the cultivation of the lands, paid the Sirkar Revenue and made over to them (Plaintiff and her sister-in-law) the remaining annual profits of the land; that this state of things continued until 1845, when Plaintiff's sister-in-law died—subsequently to which the Defendants had failed to render to her (Plaintiff) any account of the lands or of their net produce—she therefore sought her remedy by a Civil Suit.

3. In their reply, the Defendants admitted their relationship to the Plaintiff's deceased husband and brother-in-law, but denied that the

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family estate had ever been divided or that they were liable to account to Plaintiff for the produce of the land in question.

4. The Sudder Ameen found that it was proved that the family estate had been divided, which he considered the turning point in the matter at issue. He therefore decreed in favor of the Plaintiff as sought.

5. From this decision, the Defendants appealed to the Civil Court, contending that the alleged division in the family had not been proved; and further urging that even were it so proved, still they (Defendants) had a better right to the property in litigation than the Plaintiff, inasmuch as Plaintiff's husband died prior to his brother, on which event Plaintiff became entitled to maintenance only out of the brothers joint property—and consequently that when the remaining brother and his widow also died without issue, they (Defendants) became the legitimate heirs to the property to the exclusion of the Plaintiff.

6. Meanwhile the Original Plaintiff died—and her daughter was admitted as Supplemental Respondent in the Appeal Suit which was referred to the Assistant Judge for trial.

7. With reference to the claims of the Supplemental Respondent, the following question was submitted by the Assistant Judge to the Pundits of the Court of Sudder Udalut.

Question. Supposing a widow A. (possessed of her husband's landed property) to die without male issue, who ought legitimately to succeed to her? her own married daughter B. also a widow—her husband's male cousins C. and D. who come of a separate and divided branch of her husband's family.

2. Can a widow in the position of A. devise by will her husband's property in favor of her daughter B. to the prejudice of her husband's relatives C. and D.?

Answer. It is laid down in the Vignanaswareyum and other Hindu Law Books that divided cousins shall have right to succeed to a person only after the demise of the daughter of such person, consequently B. referred to in the question is exclusively entitled to succeed to A. after the demise of the latter, but C. and D. can have no right to succeed to her (A.) while B. is alive.

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2. The widow A. can devise by will the property referred to in the question in favor of her daughter B, as she (B.) is entitled to succeed to A. for reasons above stated.

8. The Assistant Judge considered the alleged division in the family to be established by the evidence adduced on the point and on the authority of the above exposition of the law in the case put—he affirmed the Original Decree for the benefit of the Supplemental Respondent.

9. The Court of Sudder Udalut admitted a Special Appeal from this Decree, as it was evident that the question put by the Assistant Judge to the Pundits of the Court, did not correctly detail the facts of the case and was consequently not calculated to elicit a correct declaration of the law in the case in point.

10. A second question was therefore put to the Pundits in the following terms.

Question. A. and B. are the wives of two undivided brothers. The husband of A. dies leaving a married daughter. After this, the husband of B. dies childless. A. also demises, there are divided cousins in the family. To whom will the property devolve on the death of B?

Answer. Under the provisions of the Law Books entitled Vignanaswareyum, &c. the property of B. will on her death devolve upon the divided cousins referred to in the question. In the question put by the Assistant Judge, it is assumed that the Original Plaintiff, the widow of Arnachella Moodelly, became possessed of the property in issue as having been her husband—whereas when Arnachella Moodelly demised, his share became absorbed in that of his undivided brother, Appacooty Moodelly, who survived him.

11. The Pundits of the Court of Sudder Udalut have declared that on the failure of Appacooty's line, which has become extinct, the property should pass to the divided cousins—the Original Defendants, (Special Appellants) and not to the Original Plaintiff or to her daughter the existing Plaintiff (Special Respondent).

12. The Court of Sudder Udalut therefore reverse the decrees of the lower Courts, and dismiss the Suit with costs.

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No. 44 of 1854.

Decree dated 15th November, 1854. *Page* 176, *M. V.*

1. The Suit was instituted by the Plaintiff (Special Appellant) to recover from the Defendants (Special Respondents) certain Shotrium land, together with the Swamy Bhogum rent thereof for one year and the Mesne profits for two years more, the total amount for which the Suit was laid being Rupees 499-13-9. The Plaintiff sued on a Bill of Sale dated 28th June 1845, purporting to have been executed to his deceased brother by the Defendants, which Deed the Defendants in their answer declared to be a forgery.

2. The District Moonsiff found that the Deed of Sale was fully proved by the evidence of the writer, and of the attesting witnesses, and that the sale itself was alluded to as a genuine transaction in the Decree in Original Suit No. 587 of 1845, against the same Defendants (Special Respondents) from which Decree, they preferred no appeal.

3. He accordingly decreed possession of the land sought to the Plaintiff, and that the Defendants should pay him rent in arrears for 3 years.

4. On Appeal by the Defendants the Civil Judge reversed this Decree of the District Moonsiff on the ground that, by the Plaintiff's own valuation of the land sought, it was evident that this deceased brother had taken advantage of the embarrassments of the Defendants to drive a most usurious bargain with them, which the Civil Judge considered could not with equity be upheld, although there was no doubt that the Deed sued on was a genuine document.

5. A Special Appeal from this Appeal Decree was admitted by the Court of Sudder Udalut as they considered the Decree of the Civil Judge to be not sustainable in Law.

6. The Court of Sudder Udalut are of opinion that the Civil Judge was not justified in setting aside the Plaintiff's (Special Appellant's) Bill of Sale on the ground that the consideration given for it appeared to him to be inadequate. The Deed was fairly obtained by the Plaintiff's brother and the Plaintiff is entitled to his rights under it.

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7. The Caurt of Sudder Udalut resolve consequently to reverse the Decree of the Civil Judge, and to affirm that of the District Moonsiff.

No. 58 of 1854.

Decree dated 18th November, 1854. *Page* 184, *M. V.*

1. In this Suit the Appellant (Plaintiff) sued *in forma pauperis*, to recover from the Respondents (Defendants) Rupees 37,885-10-11, as the estimated value of one-third share of certain family property.

2. It was stated in the Plaint that the Plaintiff's father-in-law Sankara Naick had five sons, viz. Perya Devanayaka Naick by his first wife, and Ramasawmy Naick, Chandrasekara Naick (Plaintiff's husband), Balakristna Naick (1st Defendant's husband) and Chinna Devanayaka by the second—that Perya Devanayaka Naick died before his father, leaving a son, Komarappa Naick; that Ramasawmy Naick demised without issue; that in 1836 Komarappa Naick received his share of the patrimony from the three surviving sons of Sankara Naick, who also in *Alpisi*, October November, or *Kartekai*, November December, entered into a partition of the remaining property of the family and executed mutual deeds of division, holding in common however the property allotted for charitable purposes; that on the death of Plaintiff's husband in February 1839, his share of property and the vouchers connected therewith, including the deed and list of division, were taken illegal possession of by the 1st Defendant's husband, who often promised, but as often failed to restore the same to the Plaintiff up to the time of his death, which occurred on the 30th July 1849.

3. The Plaintiff added, that, as the three brothers, Chundrasekhara, Balakristna and Devanayaka were all issueless, she as the widow of one of them was entitled to participate in the property equally with the widows of the other two.

4. The 2nd and 3rd Defendants were made parties to the Suit with reference to a will alleged to have been left by the 1st Defendant's husband; but they allowed judgment to go by default.

5. The 1st Defendant denied the right of the Plaintiff to participate in the property. She denied that her husband and his two brothers in-

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cluding the Plaintiff's husband, had entered into a division in 1838. She contended that the family was an undivided one, and that therefore she was the sole legal heiress to the estate, as the widow of the last male proprietor Balakristna.

6. The Plaintiff in her reply stated that subsequent to the institution of the Suit, the 1st Defendant offered to compromise it.

7. The 1st Defendant rejoined that the offer of compromise referred to in the reply, had been made without her authority by her servants, but that she had broken it off; that under the Hindoo Law, the Plaintiff was only entitled to receive maintenance from the estate; and that it was doubtful whether she based her claim on the plea of division or on her right to share equally with the other widows.

9. Before disposing of this Suit, the Acting Civil Judge put the following questions to the Hindoo Law Officers of the Sudder Udalut.

"1st. By the Hindoo Law, is the circumstance of co-sharers having "mutually executed deeds of division and lists of the property so divided, "without their having subsequently entered upon a separate possession "and enjoyment of the property so shared, sufficient to constitute the fact "of a division of property having been made, so as to entitle the widow "of one of the co-sharers to claim the share which was then allotted to "her husband? In other words, is subsequent possession and enjoy-"ment necessary to render valid a division of family property?"

"2nd. A. B. and C. are three undivided brothers; A. and C. die "before B. and leave widows, the former without issue and the latter has "a daughter. On B.'s death are the widows of A. and C. entitled to "claim an equal share of the property with the widow of B., also child-"less; or are they (the widows of A. and C.) entitled only to receive "maintenance from B.'s widow?"

10. The Law Officers gave the subjoined answers.

"1st. Although co-sharers may have entered into a deed of parti-"tion and other documents, still that circumstance cannot under the Hin-"doo Law render the division valid, unless they subsequently enter upon "a separate possession and enjoyment of the property so shared as men-"tioned in the said Deeds. The mere execution of the said documents

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" is not sufficient to render the division complete, or to entitle the widow " of one of the co-sharers to claim the property which was then allotted " to her husband : separate or independent possession and enjoyment of " the several allotments of the family property are essential to the com- " pletion and validity of the partition of the family estate."

" 2nd. Where a family is undivided, the Hindoo Law vests the right " of succession in undivided brothers, &c., hence the surviving brother " succeeds to the property of his deceased brother : and when he dies " leaving no male issue, his widow succeeds to him, according to the pre- " scribed order of succession. For these reasons, the property which de- " volved upon B. who died last, descends from him to his widow, who " becomes sole proprietor thereof. The widows of A. and C. who died " before, are therefore entitled, not to claim an equal share of the pro- " perty with the widow of B. but only to receive maintenance from her."

11. The Acting Civil Judge observed that the Hindoo Law, as above propounded, negatived the claim of the Plaintiff, be the family divided or otherwise : because in the former case there was found to be no separate possession and enjoyment of the divided property subsequent to the division ; and in the latter she was entitled to receive maintenance only from the family funds.

12. In regard to the fact of the division the Acting Civil Judge found there was none, on the grounds that the alleged division deed and list had not been produced ; that the oral testimony to their having been made away with by the 1st Defendant's husband, was inconclusive and untrustworthy ; and that the secondary evidence offered to its execution was undeserving of belief, and was further rebutted by the conclusive evidence of record and respectable oral testimony adduced on the part of the 1st Defendant.

13. For these among other reasons, the Acting Civil Judge dismissed the Plaintiff's claim with costs.

17. The Court of Sudder Udalut on mature consideration of the record in this case see no grounds to interfere with the judgment of the Court below.

18. It is acknowledged on both sides that in 1836, Comarapa Naick, nephew of the three surviving sons of Sunkara Naick, the

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common ancestor, received his share of the ancestral property. The allegation is made by Plaintiff, that at the same time the said three brothers (one of them being her husband) also became divided members This fact is denied by her opponent, the 1st Defendant, (widow of the last survivor of the brothers) who contends that the division in 1836, was between Comarapa on the one side, and the three brothers on the other, the latter having remained undivided throughout their lives. The nature of the division in 1836, is the question which the Court are called upon to determine.

19. According to the Plaintiff's own representations, the process of division between the three brothers was not put upon the open form of that of Comarapa Naick. He took possession of his individual share of the family estate, but the brothers held their shares together and had registration made of their portion in their three names jointly. In 1838 it is alleged fresh deeds were entered into between the three brothers for actual partition of the land, but before such partition could be effected, two of the brothers, namely, Plaintiff's husband and Chinna Davanaika Naick, demised, leaving 1st Defendant's husband as survivor.

20. A state of things such as here described would not satisfy the requirements of the Hindoo Law, which recognizes no arrangement as constituting divided membership, short of entering upon an actual appropriation of divided shares. The difficulty is met on the part of the Plaintiff by the assertion that from 1836, the parties were in the position of joint cultivators, the profits of cultivation being divided between them. It is also pleaded that from the same time, they lived in separate houses taking their meals separately.

(*The evidence is then considered.*)

26. The Court of Sudder Udalut are of opinion that these facts are conclusive of the division in 1836, having been in respect of Comarapah Naick only, and that from that time, and throughout their lives *Plaintiff's* husband and his two brothers remained undivided.

27. The Court accordingly affirm the Decree of the Acting Civil Judge, and dismiss the Appeal with costs.

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No. 48 of 1854.

Decree dated 22nd November, 1854. *Page* 191, *M. V.*

1. The Original Suit was instituted by the Special Respondent, for the recovery from the 1st Defendant, and on his death from the Special Appellants as his heirs, of the sum of Rupees 95-1-4 alleged to be due on a bond, executed by the 1st Defendant.

2. The District Moonsiff considered the execution of the bond proved, and decreed that the Plaintiff should recover the amount sued for, from any property which might have been left by the 1st Defendant; but did not hold the 2nd, 3rd and 4th Defendants (Special Appellants) personally answerable for the debt.

3. Upon Appeal by the Plaintiff, the Subordinate Judge declared the 2nd, 3rd and 4th Defendants as the heirs of the 1st Defendant to be personally liable for the Plaintiff's claim.

4. From this Decree the Special Appellants presented an application for the admission of a Special Appeal on the ground that it had been proved that the deceased 1st Defendant by whom the bond sued on was executed, was a Junior member of the family; that it had not been showed that he had acquired any property or that he had managed the affairs of the Tarwad, and that therefore the Decree of the Subordinate Judge was contrary to the usage of the country and to the Circular Order of the Sudder Udalut, No. 73.

5. Before disposing of the Special Appeal application, the Court deemed it necessary to call upon the Subordinate Judge to explain in what relation the 2nd, 3rd and 4th Defendants stood towards the 1st Defendant; and whether he considered the 1st Defendant to have been the head of the family, and the debt to have been one chargeable against the family, and if so upon what evidence.

6. In his return the Subordinate Judge stated:

1st. That the 2nd Defendant was the elder brother of the family and that the 3rd and 4th Defendants were nephews of the late 1st Defendant.

2nd. That it had been proved by document C. filed in the Appeal Suit that the arrears of pay, as Adigharry, due to the deceased 1st Defendant,

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were received by the 3rd Respondent (4th Defendant) as the nearest heir, and that under these circumstances in absence of all opposing evidence, the Subordinate Judge considered the 1st Defendant the head and manager of the family and the debt in question justly chargeable against the family property.

7. The Court of Sudder Udalut being of opinion that the circumstances which had led the Subordinate Judge to consider the 1st Defendant, to have been the head of the family and the debt a family one had no relation to the question, and that the decision that the remaining Defendants are answerable for such debt (save and except to the extent of the pay of the deceased, received by the 3rd Respondent) was untenable in Law, admitted a Special Appeal.

8. The Plaintiff in the Original Suit has allowed through his Vakeel that the debtor, the 1st Defendant, was a junior member of the family. The Subordinate Judge appears to have been satisfied of the fact, but nevertheless has charged the debt upon the family : such a decision the Court of Sudder Udalut have to observe is wholly contrary to Law.

9. The Court consequently reverse the decree of the Subordinate Judge and affirm that of the District Moonsiff with this addition that the 3rd Respondent (4th Defendant) is to be held answerable for the debt to the extent of Rupees 5-4-0 being the arrears of the deceased 1st Defendant's pay received by him.

No. 49 of 1854.

Decree dated 13th December, 1854. *Page* 214, *M. V.*

1. The Original Suit was instituted by the Special Appellants for the purpose of arresting the sale of certain property yielding an annual income of 1212 fanams, attached in execution of the Decree passed in Original Suit No. 5 of 1845, on the file of the Subordinate Court of Calicut in favor of the 1st Defendant, and against the 2nd, 3rd, 4th, 5th and 6th Defendants.

2. The Plaintiffs, who are females, claimed the release of the property from attachment on the ground that it had been set apart exclusively for

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their maintenance and could not therefore be held liable for debts incurred by the Defendants. They adduced a *varee* deed in support of their plea.

3. The 1st Defendant, who alone defended the Suit and who is the head of the family to which the Plaintiffs and Defendants belong, contended that the deed adduced by the Plaintiffs, bore a different signification from that assigned to it, and, that it had been superceded by another deed of a later date which had been confirmed by a Decree of Court.

4. He also took exception to the Suit on the ground, that it had been brought for a part only and not the whole of the property affected by the deed on which the Plaintiffs based their claim.

5. Both the Lower Courts dismissed the Plaintiff's claim, the Subordinate Judge observing that the latter deed referred to by the 1st Defendant clearly cancelled that relied on by the Plaintiffs; and, that nothing was stated in that document of any property having been specially excluded from it for the family use. The Civil Judge remarked that even if the *varee* deed on which the Plaintiffs mainly relied was not cancelled but only amended by the latter document referred to, "still "it was so vaguely expressed and loosely worded that even if the in-"tention of its framer could be shewn from other sources to be what "Plaintiffs said it was, it would be difficult to make it bear such a con-"struction as that they put upon it."

6. Dissatisfied with the Civil Judge's Decree, the Plaintiffs applied for the admission of a Special Appeal, and the Court of Sudder Udalut having called for the documents in question granted their application, seeing reason to doubt the accuracy of the constructions put upon the said documents by the Lower Courts.

7. On perusal of the record, the Court of Sudder Udalut are of opinion that, the 1st Defendant, as a member of an undivided family cannot bring any part of the family property to sale in satisfaction of individual claims of his own or in behalf of the branch to which he belongs. Whatever arrangements may have been made among the family for the conduct of their affairs, the interests of the family remain in law united, and one portion of the family cannot enforce process against the other in respect of their common property. It is for the head of the family

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to direct all its concerns, and the proper course for the 1st Defendant's branch to have taken for settlement of their claims was to have had them dealt with by him. The present head of the family, it is allowed on both sides, is the 1st Defendant. He therefore has the remedy in his own hands as to the administration of the estate, all the concerns of the family being subject to his controul. He too is responsible for the maintenance of the Plaintiffs, and the *varees* of 966 and 974 pleaded by the Plaintiffs can present no hindrance to the exercise of his will as to the mode in which this maintenance is to be secured to them. Those *varees* simply provided a way for the management of the estates for the time being, and it is competent to the 1st Defendant to make what fresh arrangement for the purpose he may deem fitting.

8. The Court of Sudder Udalut under these circumstances reverse the Decrees of the Lower Courts and rule that the property in question in this Suit cannot be sold to satisfy the claims of the 1st Defendant.

No. 69 OF 1854.

DECREE DATED 16TH DECEMBER, 1854. *Page* 218, *M. V.*

1. This is an action to recover Rupees 60,250, being the balance of principal and interest due on a bond which it was alleged had been executed by a predecessor of the Respondent (the incumbent of the Zemindary) and assigned over to the Appellant by the widow of the obligee.

2. It was stated by the Plaintiff (Appellant) that on the 12th November 1815, one Tyagaraja Pillay, lent a sum of Pagodas 10,000 or Rupees 35,000 on the security of the bond sued on to Raghunatha Setapati, commonly called Annasawmy Setapati the then Zemindar of Ramnad, who engaged to repay the same on the successful termination of a Suit then pending relative to his title to the estate; that Raghunatha died in 1820, and the Suit in question was decided in 1828 in favor of his adopted son Ramasawmi Setapati, who under that decision gained possession of the estate in 1829, and in January 1830, paid 1,000 Pagodas or Rupees 3,500, in part liquidation of the bond, but demised in April 1830, when the estate was entrusted to a manager, who refused all settlement with the creditors till 1842, in which year he paid Rupees 1,000 under the

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bond; that shortly after the manager was suspended and the estate taken under the management of the Court of Wards, from whom it passed into the hands of the Defendant (Respondent) in July 1846; that during the interval the estate was in charge of the Court of Wards, the Defendant paid out of the allowance granted to her two items of 200 and 175 Rupees respectively on account of the bond; that Tyagaraja died in October 1846, and the Defendant, since her assumption of the Zemindary, made several promises of payment to his widow; which not being fulfilled, she duly assigned the bond over to the Plaintiff.

3. The Defendant, in answer, denied the execution of the bond and the payments and promises alleged to have been made under it. She dwelt on the existence of hostile feelings between the grantor and grantee of the bond and on the residence of the latter at Trichinopoly at its date, as circumstances inconsistent with the fact of its execution. She added that the Plaintiff assigned no reason for claiming interest, which, according to his admission, the bond did not stipulate for.

8. The points for determination herein were laid down by the Civil Judge to be—1st. Is the bond authentic? 2nd. If so, how does it stand affected by the Law of Limitation?

10. The Civil Judge likewise refrained from commenting on the evidence to the payment of the 1,000 Rupees. For he held that even admitting it to have been a true and bona fide one, the manager who made it, was totally incompetent to do so, and thereby throw away a legal advantage that had accrued to the estate: the functions of a manager being, in the opinion of the Civil Judge, confined to the transaction of such ordinary business of the estate as was necessary for its *welfare*.

11. With regard to the two payments alleged to have been made by the Defendant in 1843, the Civil Judge observed that he did not consider the evidence proved those payments, but the contrary; that even supposing them to be true, the acts of the Defendant, situated as she *then* was, compromised the estate, and that such acts in order to have any weight, must have been done by the Court of Wards, under whose management it then continued.

12. In disposing of the fact of the alleged promises made by the Defendant since her assumption of the estate in 1846, the Civil Judge

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condemned the evidence on this head as being improbable and unworthy of credit. And he further observed that even on the supposition of its credibility, it appeared to him that a verbal offer to give *something* for an old and obsolete claim could not be taken as such an "admission of demand" or such "promise to pay," as the Law requires for keeping alive or revivifying a claim.

13. For the foregoing reasons, the Civil Judge dismissed the Suit as being barred by Clause fourth, Section XVIII, Regulation II of 1802.

14. From this Judgment the Plaintiff (Appellant) now Appeals. He takes a leading exception to the whole of the proceedings held by the Civil Judge in the Original Suit, to the effect that the Decree of that Officer is contrary to practice (see * Decree in Appeal No. 44 of 1851 before Sudder Udalut) in that it is pronounced upon a question that was *neither recorded as a point for proof nor raised in the Pleadings;* the Defendant having never disputed the competency of the manager and of herself to make the payments they did in part liquidation of the bond sued on.

15. Passing over this objection to the Decree of the Civil Judge, the Appellant seeks its reversal on the following grounds.

I. That there is no warrant either in Law or equity for the dictum of the Civil Judge, that no one in the situation of a manager or guardian could do any act such as was within the power of the principals acting for themselves, and which might render those whom they represented liable for it.

II. That the manager of the estate who made the payment of Rupees 1,000, was so entirely the representative owner of the estate, and acted and was recognized by all the authorities as such, that no line could or can be drawn between any acts done by him in the name of the estate as affecting third parties.

III. That according to equity, Tyagaraja was entitled to every indulgence on account of his forbearance to press his claims.

IV. That the Civil Judge has erred in discarding the evidence to the payments made by the Defendant in 1843.

* Vide Page 44.

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V. That the Civil Judge was further in error in observing that the acts of the Defendant as *Guardian* could not prejudice the interests of the estate, because she was a guardian *merely in name*, while actually she was proprietress of the estate in her own right.

VI. That the Civil Judge has improperly rejected the evidence to the promises made by the Defendant.

17. The Court of Sudder Udalut concur with the Civil Judge, that the bond sued upon is barred by the statute of Limitations.

18. The bond is dated so far back as the year 1815. The first payment thereon is said to have been made by Ramaswami Setapati, the then Zemindar, in January 1830. The next is described to have been by Moottoo Chella Tavor, in October 1842. There being an interval of more than 12 years between these alleged payments, the bond was not actionable at the time, the second is said to have been made, and the Civil Judge has considered that such payment could not suffice to revive the right of action on the bond, since the party said to have made it was not the Zemindar, but one merely in management of the estate.

19. The Court of Sudder Udalut concur in this view. The manager could only recognize legal claims upon the estate, and was not competent to revive such as had become extinguished by Law.

20. The Plaintiff objects that the question of the competency of the said manager so to revive the bond had not been raised by the Defendant or laid down by the Civil Judge as a point for determination.

21. The Court of Sudder Udalut do not consider the objection to be of weight. The Civil Judge received all the facts pleaded by the parties, and the evidence offered by them thereto, and in coming to a decision on the case, the consideration in question presented itself to him and he gave effect thereto. The said consideration involved a point of Law, overlooked apparently by the Defendant, but such as it was not the less incumbent upon the Civil Judge to attend to, and had the Civil Judge acted otherwise than he has done, he must have done violence to his sense of what the Law exacted. The Civil Judge sat as Guardian and Administrator of the Law, and could not have lent himself to break it.

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22. As regards the want of opportunity to the Plaintiff to meet this objection to the act of the manager, the Court of Sudder Udalut do not think that the Plaintiff's interests have suffered by the question not having been recorded as a point for determination in the Suit. The said question involved no matter of fact on which evidence could be presented by the Plaintiff. It arose simply on the appreciation of facts as described by the Plaintiff himself, and it does not appear to the Court of Sudder Udalut, that considerations such as the present occurring to a Judge when weighing the value of facts put before him, should first be subjected to the ordeal of the reasonings of the party affected thereby before being acted on by the Judge. Where the Law allows of an Appeal against the decision of a Judge, the party aggrieved by such decision can bring every conclusion of the Judge to the test of the Appellate authority, and this resource the Plaintiff has had and has availed himself of.

23. The next payments on the bond are said to have been made by the Defendant in April and May 1843, when Guardian of her minor daughters, and promises of adjustment and attempts at compromise are said to have been made by her in 1846, when she became herself the Zemindar on the demise of her daughters.

24. At the alleged payments in 1843, the bond had again become extinct in Law by lapse of time, and the Civil Judge objects in like manner to the effect of such payments that, being by a Guardian and not by the party actually liable, they could not revive the bond.

25. The Court of Sudder Udalut differ from this conclusion of the Civil Judge. The Defendant, they conceive, when becoming herself the Zemindar, would be bound by acknowledgments of the debt she had made at an anterior time. But the Court are unable to give the Plaintiff any award on the ground of these said payments; for they find that the evidence, even if true, only goes to shew that they were made in the Defendant's name by another, namely, her mother, and that there is no evidence to the Defendant having personally acknowledged the obligation of the bond on the occasions in question. In like manner as to the promises of adjustment and attempts at compromise alleged to have occurred in 1846, the evidence is to these having been on the part of the Defendant's brother in her name, but not that she herself made any such acknowledgments.

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26. There being thus no evidence that the obligation of the bond has been acknowledged within 12 years from the institution of the Suit by the party liable for the bond, the Court of Sudder Udalut affirm the Decree of the Civil Judge, and dismiss this Appeal.

No. 91 of 1854.

Decree dated 18th December, 1854. *Page* 225, *M. V.*

1. The Original Suit was instituted by the Special Appellants, for the recovery from the Defendant, as the heir of one Madar Moheedeen Rowthen, of the sum of Rupees 150, alleged to be due on a bond executed by the said Madar Moheedeen Rowthen under date the 30th July 1836, whereby he agreed to pay to the Plaintiffs the sum of Rs. 217-15-6, being the balance due on a settlement of accounts by six instalments, the last of which was to become due on the 13th July 1842.

4. The District Moonsiff having dismissed the Plaintiff's claim, on the ground that it was barred by the Statute of Limitations, the Suit on Appeal was remanded by the Principal Sudder Ameen for review of judgment, on the ground that the District Moonsiff had omitted to state his reasons for discrediting the evidence of certain witnesses in the case. The review resulted in a decision in favor of the Plaintiffs.

5. On Appeal by the 1st Defendant, the Principal Sudder Ameen reversed the District Moonsiff's revised decision, being of opinion that the cause of action arose on the first default of the Defendants to pay any one of the instalments provided for in the bond, and that consequently, as the first default occurred more than 12 years before the institution of the Suit, the Suit was barred by the Law of Limitations.

6. The Court of Sudder Udalut resolve to admit a Special Appeal in this case, and to remand the Suit to the Principal Sudder Ameen for review of judgment.

7. The Principal Sudder Ameen is in error in concluding that, on failure of the first instalment, the Plaintiff was bound to enforce the penalty of the bond by seeking to recover its full amount, and that the Statute of Limitations runs from the date of such failure. The Court of

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Sudder Udalut are of opinion that it was open to the Plaintiff to forego pressing the said penalty, and that he might remain content to receive the sum of the bond by instalments as originally agreed upon. The Statute consequently would only run from the date of the expiration of each instalment.

8. The Court of Sudder Udalut find that at the date of the Suit recovery of the instalments payable in 1840, 41 and 42, was not excluded by the Statute. The Suit has therefore to be decided on its merits as regards these instalments, and the Court of Sudder Udalut resolve to remand it to the Principal Sudder Ameen for revision of judgment accordingly.

No. 54 of 1854.

DECREE DATED 20TH DECEMBER 1854. *Page 227, M. V.*

1. The Original Suit was instituted by one Vaniambalath Poodicherry Coonhy Pathooma for the recovery from the Special Appellant and six others, of 8 parcels of land, which were claimed by the Plaintiff, under a will alleged to have been executed by his father Coonjy Moossa, who was also the brother of 1st and 4th, and Karnaver of 2nd and 3rd Defendants.

4. The Moofty Sudder Ameen decreed in Plaintiff's favor, affirming the validity of the will, and in Appeal the Civil Judge confirmed such decree, remarking that the evidence adduced as to a gift by the deceased on behalf of the 7th Defendant was very vague, and of no weight whatever. The Civil Judge, while confirming the award of the Lower Court, deemed it unnecessary to decide upon the genuineness or otherwise, of the will under which Plaintiff claimed, because the 7th Defendant, who was the only adversary, possessed no title as heir at law, being merely a distant relation.

5. A Special Appeal was admitted by the Court of Sudder Udalut, inasmuch as it appeared that the bequest to Plaintiff on the face thereof was not in accordance with the rule of descent by Maroomakatoyem, prevailing in the family, a Karnaven not having the right to will property to other than the heirs.

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6. The Court of Sudder Udalut are of opinion that the bequest to enforce which the Suit has been brought is not sustainable in Law.

7. The property is ancestral, and belongs to a family governed by the law of Maroomakatoyem, and it is not competent to a member of such a family to alienate any portion of their estate out of the line of descent to his daughter.

8. The Court of Sudder Udalut therefore reverse the decrees of the Lower Courts and dismiss the Suit with Costs.

1855.

No. 23 of 1854.

Decree dated 20th January, 1855. *Page* 5, *M. V.*

1. The Original Suit was brought by the Plaintiff against two undivided brothers, to recover a sum of Rupees 5,000 due on a Kararnamah executed to him by one of them the 1st Defendant.

3. The Civil Judge found that the Defendants were brothers undivided, and, dismissing, as altogether without proof, the 1st Defendant's allegation that the transaction in regard to the Bond was tainted by the Plaintiff's fraud, he decreed for the Plaintiff, including both the Defendants as liable under the deed.

4. From this award the 2nd Defendant alone appeals on the ground that the Decree against him of the Civil Judge is not founded on the law of the parties, who are Mahomedans. The 1st Respondent filed an answer upholding the Original Decree.

5. The Civil Judge, the Court of Sudder Udalut observe, would seem to have declared the liability of the 2nd Defendant for the Bond sued upon, on principles prevailing in Hindoo Law, whereby one member of an undivided family may, under certain circumstances, be held answerable for a debt incurred by another member. In the present case the parties are Mahomedans, and, as explained by the Cauzee-ool-Coozat who attended during the hearing of the case before the Court of Sudder Udalut, the 2nd Defendant could not be liable for the Bond executed by his brother

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the 1st Defendant, unless, by some written instrument showing partnership in trade, he had incurred such liability under his own hand. No such instrument having been obtained from the 2nd Defendant, the Court of Sudder Udalut absolve him from the Bond, leaving the Decree of the Civil Judge to hold good only against the 1st Defendant.

No. 89 of 1854.

Decree dated 7th February, 1855. *Page* 23, *M. V.*

1. The Original Suit was instituted by the Father of the Special Appellant against 31 Defendants, for the recovery of certain land valued at Rupees 183-3-0 with its Meerass registry, and part produce worth Rupees 48.

2. It was set forth in the Plaint that the land in question was purchased by Plaintiff from the 1st Defendant for Rupees 400 under a Bill of Sale, and that portions of it were subsequently rented and mortgaged to several of the Defendants, who, at the instigation of the 1st Defendant, refused to permit the Plaintiff's redemption of that portion of it mortgaged, and declined to pay the rent due upon that which was held by them under lease.

3. The 1st Defendant, admitting the execution in Plaintiff's favor of the Deed of Sale for the land claimed, stated that it had been executed, merely nominally and temporarily, in order to enable him to obtain a reduction of the kist due upon the land; and that the Plaintiff, who was then his "Agent," had never paid him any thing for the land, which had always been in his (1st Defendant's) possession, and had been by him rented, mortgaged and otherwise transferred to others. He denied having granted Plaintiff any Deed of Sale on unstampt paper previous to the one he admitted, as alleged in the Plaint; and he denounced that document and another agreement, said to have been signed by him, admitting the receipt of the purchase money as forgeries.

6. The Sudder Ameen of Combaconum gave judgment in favor of the Plaintiff, being of opinion that the evidence was conclusive as to the receipt by the 1st Defendant of the full consideration for the Deed of Sale; and that the reason assigned by 1st Defendant for the execution of the document was not, under the circumstances of the case, at all probable.

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7. The Assistant Judge heard the case in Appeal, and on the application of Appellant called for further documents and examined additional witnesses. He discredited the truth of Plaintiff's claim in reference to his having become bona fide the purchaser of the land claimed by payment of the consideration mentioned in the Deed of Sale, and accordingly reversed the Decree of the Sudder Ameen and dismissed the Plaintiff's claim with costs in Original and Appeal.

8. From this decision a Special Appeal was preferred, and was admitted by the Court of Sudder Udalut on the ground that it was manifest that the documentary evidence in the case had been misconstrued by the Assistant Judge, especially document E which the Court remarked had been treated as a Bill of Sale, whereas in fact it was a mortgage bond.

9. The Plaintiff's case, the Court of Sudder Udalut observe, depends upon his title Deed D. It was not incumbent upon him to prove payment of consideration, the Deed itself being prima facie evidence of the completeness of his title. The burthen of proof that the transaction was otherwise than the Deed expresses, rested with the 1st Defendant.

10. This the Assistant Judge appears to have overlooked, and furthermore in judging of the evidence received on the Plaintiff's behalf he has misconstrued his exhibit E.

11. This document the Assistant Judge has viewed as a Bill of Sale while in fact it is only one of conditional Sale.

12. The Assistant Judge considers it to the prejudice of the Plaintiff's claim that he did not make over to the 1st Defendant the house referred to in the Deed, in completion of the consideration for the property now in issue, while the Deed allowed of the Plaintiff redeeming the house by payment of Rupees 55, and which payment the Plaintiff alleges was made when the title Deed D now sued upon was granted him.

13. The 1st Defendant is not found to have offered any evidence establishing his plea of non-receipt of the consideration, and such being the case the Plaintiff in the opinion of the Court of Sudder Udalut is entitled to an award upon his Deed D.

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No. 86 of 1854.

Decree dated 17th February, 1855. *Page* 30, *M. V.*

1. The Original Suit was instituted by one Pedda Ramanna Reddy against three brothers, his paternal cousins, for the recovery of a moiety of the family property, valued at Rupees 46,321-7-0.

2. It was stated in the Plaint that Plaintiff's father and the father of the Defendants had never divided and that there had been no division subsequently to the demise of the survivor of them; and that it was to compel the Defendants to come to an equitable division that the present action was brought.

3. The 2nd and 3rd Defendants did not answer: the 1st Defendant pleaded that the Plaintiff was not entitled to a moiety of the family estate; which, he alleged, was divisible into three shares and one half share—the Plaintiff's title being to one of these shares only. He stated that as far back as 1828 and at the instance of one of the then coparceners in the family estate, a partition of such estate was made under the supervision of certain mediators; and that by the terms of the Deed* at that time executed, the estate was parcelled out into four and a half shares which were thus distributed: to the Plaintiff's father one share, to the Defendants one share, to their joint parcener Virareddy one share, to another joint parcener B. Krishnareddy one share, and the remaining half share to a daughter of the last mentioned sharer, by name Rangamma.

* Exhibit A.

4. Immediately after this partition, the answer went on to state, Virareddy permanently separated himself from the family, the other separated parceners forming a re-union among themselves. Subsequently, however, one of the re-united partners, B. Krishnareddy, left the family, reserving for his own benefit one half of his share and bestowing the other half on his son; who, by his will, bequeathed the same to his half sister, Rangamma aforesaid.

5. The remaining partners, the 1st Defendant further stated, continued without partition until the year 1842; when Plaintiff's father, the eldest member of the family, being on his deathbed, it was deemed advisable to settle the rights of each individual parcener. On this occa-

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sion, the 1st Defendant alleged, a Pharikut was drawn up and executed by which, among other things, it was agreed that the state of those of the parceners who were yet in re-union should be divided into three shares and a half share, and further that the Plaintiff's interest therein should be limited to one whole share.

6. In his reply the Plaintiff traversed the answer in toto. The Defendants put in a rejoinder.

7. At this stage of the proceedings, the 1st Defendant demised and the Plaintiff also. The Plaintiff left no issue of his own, but was survived by his mother and two of his wives. Of these, the mother and the elder widow prayed to be allowed, together with the younger widow, to conduct the Suit as Plaintiff's heirs ; while the younger widow pleaded that such right was with her alone, as the guardian of a young boy adopted by her late husband, the Plaintiff, in conjunction with herself. This adoption was contested by the elder widow and the Defendants.

8. The Civil Judge decided that prima facie the two widows were the deceased's heirs, and directed that the Suit should be conducted by them jointly.

9. Adverting to the late Plaintiff's rights under the division sued for, the Civil Judge found that the Plaintiff was entitled to one-third of the litigated property and not to a moiety as claimed by him. The Kararnamah of 1828 (Exhibit A) the Civil Judge held to be valid ; and he also gave credit to the subsequent separation, under the circumstances alleged in the answer, from the re-united parceners, of B. Krishnareddy ; to the gift by that individual of one half of his share to his son, and the will of that son bequeathing such half share to his sister Rangamma, a disposition of his property recognized by the Pundits (to whom the Civil Judge made a reference) as good under the Hindoo Law.

10. The share of the Plaintiff having been thus shown to be one-third of the family estate, the Acting Civil Judge observed that the Plaintiff having demised, it became necessary to declare his representative ; whether the mother, the elder or younger widow or the two widows jointly, or the youth alleged to have been adopted by the deceased as his son.

11. The Plaintiff's mother having survived both her son and her husband, was entitled, the Civil Judge was clear to a maintenance only. The

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next heirs, *primâ facie* were the deceased's wives : but led to credit the alleged adoption, which "had been publicly acknowledged" by the deceased, "although the usual ceremony may not have been completed," the Civil Judge decreed in favor of such adopted son, adjudging him to make a suitable provision for such members of the family as are entitled to maintenance, out of his adoptive father's estate, in the mode prescribed by the usages of the parties.

12. The 2nd Defendant, now the eldest survivor of the three brothers against whom the suit was brought, appealed, contesting the validity of an adoption admitted by the Civil Judge to have been in-formal and incomplete, and praying the Court to divide the whole of the family estate, inclusive of the half share said to have been conveyed by the son of B. Kishnareddy to his sister Rangamma (but which legacy the Appellant contends never was made) between himself, his surviving brother (the 3rd Defendant) and the sons of his late brother, the 1st Defendant deceased, in three equal shares; after making such order for the maintenance of the Plaintiff's widows as might appear reasonable.

16. The status of the family having been explained to the Pundits of the Court of Sudder Udalut they have declared, that, as the Deed A in itself effected no division, the parties who omitted to act upon the said Deed are to be viewed, with their property, as undivided. The persons and property involved in the present litigation were thus in this condition at the institution of the Suit, and the object of the Suit was accordingly that the Plaintiff might have his share in the said undivided property allotted to him.

17. The Plaintiff having demised before the Suit was brought to an issue, the claims to represent him of the parties who have appeared for that purpose have to be determined.

18. These are, the 1st Respondent his senior widow, and the 2nd Respondent, alleged to have been adopted by him in conjunction with his second wife.

19. The Pundits have declared that as the Plaintiff demised before the Suit brought by him for his share was decided on, he is to be viewed as having demised while undivided; and his widow consequently can have no right to the share in question. The claim of the 1st Respondent the Sudder Udalut accordingly declare to be untenable and they reject it.

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(*The alleged adoption declared not proved.*)

21. There being thus no person competent to continue the Suit in the behalf of the Plaintiff, deceased, the Court of Sudder Udalut resolve to set aside the Decree of the Acting Civil Judge and to dismiss the Suit.

No. 3 of 1855.

Decree dated 28th February, 1855. *Page* 41, *M. V.*

1. The Original Suit was instituted by the Special Appellant before the District Moonsiff of Mannargoody, to recover certain land and a house, to which he was entitled as the adopted son of one Pettaparoomal Taven, deceased; but of which he had been dispossessed in virtue of a Deed of Acquittance extinguishing the adoption. This Deed the Plaintiff alleged to have been extorted from him when incapable, from minority, of protecting his own interest.

2. The Plaint further stated that the Plaintiff's adoption took place immediately after the death of Pettaparoomal Taven, whose widows adopted him in accordance with the wishes of the deceased.

3. In answer, the Defendants stated that the 1st Defendant was adopted by these widows, the Plaintiff having mismanaged the estate, and having by the Deed of Acquittance given up any right he might have to the property in dispute.

4. The District Moonsiff recognizing the adoption of the Plaintiff, considered that the Deed of Acquittance had been extorted from him. He decreed therefore in Plaintiff's favor.

5. On Appeal, the Subordinate Judge reversed this decision. He concurred with the District Moonsiff that the Plaintiff had been adopted, and there was, in his opinion, no reason to consider that the renunciation of the adoption was compulsory. Further, as the Plaintiff was shown to have inherited property from his natural father, by whom the Deed of Acquittance had also been signed, and as no complaint of extortion was made during ten years, there were, in the opinion of the Subordinate Judge, grounds for believing that the Plaintiff had willingly and with a full knowledge of its effect, signed the Deed of Acquittance and thereby forfeited his rights to the property in dispute.

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6. The Court of Sudder Udalut admitted the Special Appeal on the ground that the Deed of Acquittance was, in effect, a resignation by Plaintiff of his position as an adopted son, an act that by Law was not permissible, and that the Subordinate Judge appeared therefore to have erred in accepting this Deed as extinguishing the Plaintiff's adoption.

7. The Court of Sudder Udalut consider the decision of the Subordinate Judge that the Plaintiff under the document No. 1 cancelled his own adoption to be at variance with Law, it not being competent to an individual to give up a position such as that of an adopted son, and which places him upon the footing of a begotten son. In view, however, of the Deed in question, they are of opinion, that it holds good against the Plaintiff, as respects the property to which it relates, the Plaintiff having, by the Deed, abandoned all right and title thereto in favor of the widows who adopted him. It is not, the Court observe, open to the Plaintiff to repudiate his own act.

8. The Court resolve therefore to dismiss the Appeal with costs.

No. 73 of 1854.

Decree dated 7th March, 1855. *Page* 47, *M. V.*

1. The Original Suit in this case was instituted by the Special Appellant in the Sudder Ameen's Court at Combaconum against three Defendants for the recovery of Rs. 938-2-9, the value of certain Arekanuts.

2. It was set forth in the Plaint that the father of the 1st Defendant, the 2nd Defendant and the husband of the 3rd were "undivided" brothers; that in 1837, the 1st Defendant made over to Plaintiff's father a cargo of nuts consigned to him at Negapatam by the husband of the 3rd Defendant from Acheen; that the nuts were disposed of by the Plaintiff's father, and the proceeds credited to the 1st Defendant's father on a settlement of accounts; that subsequently Plaintiff and his father, 1st Defendant and his father and 2nd Defendant being at Acheen, the three latter administered to the Estate of the 3rd Defendant's husband, who had died in that country, and, in their capacity of Administrators, sued the Plaintiff and his father for the value of the nuts already mentioned;

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that the Acheen Court gave judgment against Plaintiff and his father for Rs. 938-2-9, which sum was forthwith levied from them. Under these circumstances the Plaintiff sued to recover the sum which had been previously paid by him to the 1st Defendant's father.

3. The Sudder Ameen on the merits decreed for the Plaintiff.

4. The Assistant Judge of Combaconum in Appeal, reversed the Original Decision with all costs, on the ground that the Suit was not actionable, as being of the nature of an Appeal against a decree of a Court of Justice of a foreign independent Kingdom, to the jurisdiction of which Plaintiff had voluntarily rendered himself amenable.

5. On Respondent filing a Petition of Special Appeal, the Court of Sudder Udalut observed that the ground on which the Assistant Judge had reversed the Original Decree was untenable, and, in admitting the Special Appeal, they directed the Appellate Court to pass judgment de-novo and decide the Plaintiff's claim on the merits.

6. The present Assistant Judge on a review of the case, decided in favor of the Defendant. He observed that " the conclusions arrived at " in reference to the 1st Defendant's father being the recipient of the sale "proceeds of the nuts, by the writer of the Acheen Decree, cannot be " any guide to this Court ; because confessedly the 1st Plaintiff's accounts " were not personally inspected by that " authority," and he was of opinion that such as was adduced in respect to alleged entries therein corroborative of the Plaintiff's claim, was of a nature to have been " received " by the Acheen Judge with considerable caution" instead of being credited as it was.

7. It appearing to the Court of Sudder Udalut that the Assistant Judge had erred in questioning the sufficiency of the evidence upon which the Court at Acheen found the fact of the payment by 1st Plaintiff to 1st Defendant of the price of the nuts, he having no authority thus to review the said Decree, the facts ascertained in which, if judicially so, he should have accepted. They admitted a Special Appeal in order to pronounce upon the value of the said Acheen Decree.

8. The Court of Sudder Udalut observe that the Sudder Ameen found for the goodness of the document B presented as the Decree of

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the Court at Acheen, and that the late Assistant Judge, Mr. Swinton, in his judgment on appeal recognized the validity of the document. Under these circumstances and as the Decree was remanded for reconsideration on other and distinct grounds, it appears to the Court that the Assisstant Judge, Mr. E. W. Bird, in his Decree of revision, was not competent to call in question the said document. Neither was he authorized to canvas the merits of the judgment recorded in the document and to put forth opposite conclusions of his own. The said judgment must necessarily be upheld as emanating from a Court having jurisdiction in the matter therein adjudicated on, and the finding of the said Court was that the money now in issue was wrongfully paid by the Plaintiff to the 1st Defendant's father, that the same was due to the Estate of the 3rd Defendant to which payment was awarded accordingly, and that the Plaintiff should seek his remedy by action. Thereupon the Plaintiff brought the present Suit, and it is clear as decided by the Sudder Ameen that he is entitled to recover the sum in question from the 1st Defendant.

9. The Court of Sudder Udalut therefore reverse the Decree of the Assistant Judge, Mr. E. W. Bird, and affirm that of the Sudder Ameen.

No. 2 of 1855.

Decree dated 7th March, 1855. *Page* 49, *M. V.*

1. The Original Suit was instituted to recover from the Defendant Rupees 232-4-0, the balance of principal and interest due on a Bond.

2. The Plaint stated that Defendant's father having died greatly in debt to the Plaintiff, the 1st Defendant and other heirs of the deceased executed to the Plaintiff Bonds for the whole amount due; that Defendant accordingly gave his Bond for Rupees 300; that the stipulations were that the amount should be paid off in 12 yearly instalments; that the above payments should be endorsed on the back of the Bond, and that in event of litigation, any allegation of other modes of settlement should be *ipso facto* discredited; that, finally, if any instalment was not paid within the prescribed time, Plaintiff should be put into possession, free of rent, of certain fields the property of Defendant and enjoy the same

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in liquidation of the debt; that Plaintiff having been so put into possession of Defendant's fields, under the terms of the Bond, had been subsequently ousted therefrom; and that he now sued for the balance of the debt.

3. The Defendant admitted the genuineness of the Bond, but pleaded that he had discharged the same. Plaintiff, he stated, had agreed to take two-thirds of the amount, in proof of which the Defendant filed a receipt.

4. The Subordinate Judge, on the merits decreed for the Plaintiff. On Appeal, the Civil Judge reversed this award, attaching credit and validity to the Defendant's receipt.

5. On the application of the Plaintiff, the Court of Sudder Udalut admitted a Special Appeal in this case, on the ground that the Appellate Court had accepted the receipt filed by the Defendant in violation of an express condition in the plaint Bond.

6. The Court of Sudder Udalut are of opinion that the conditions of the Bond sued on must be upheld in all respects, and that the absence of any endorsement on the Bond acknowledging the payment pleaded is fatal to the plea that such payment was made.

No. 12 of 1855.

Decree dated 7th March, 1855. *Page* 51, *M. V.*

1. The Original Suit was brought in the Court of the Hindoo Sudder Ameen by the Plaintiff against one Toda Pillay and his Son, the Special Appellant, to enforce the registration in Plaintiff's name of certain Merassee lands sold to him by the recorded proprietor, 1st Defendant.

2. The Plaint stated that the 1st Defendant sold to Plaintiff the lands in question with possession thereof by Deed of Sale executed on the 5th June 1848; that the Plaintiff was in possession up to the date of the institution of this Suit, but had not been able, owing to the evasive conduct of the Defendants, to obtain the registry.

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3. The 1st Defendant did not appear. The 2nd Defendant answered that the transfer was void, the Estate being ancestorial, and his father, 1st Defendant, by consequence incompetent to make alienations without his, 2nd Defendant's consent, which had not been given; or except in a case of necessity and no such plea was maintainable.

4. The Sudder Ameen decreed for the Plaintiff, on the ground that by Hindoo Law a son has no ownership in property ancestorial or self-acquired so long as the father is alive.

5. On Appeal, the Acting Civil Judge confirmed the Original Decree laying stress on the admission of the 2nd Defendant—that he and his father were living separate in the enjoyment of separate lands.

6. On the application of the 2nd Defendant, the Court of Sudder Udalut admitted a Special Appeal on the following grounds.

" The Acting Civil Judge has considered the absence of the 2nd De-" fendant's consent to the Bill of Sale pleaded by Plaintiff to be imma-" terial, as he had allowed that he lived separately from his father, the " 1st Defendant, the granter of the said Deed, enjoying land separately " from him. This admission of the 2nd Defendant does not, the Court " observe, amount to an allowing division of interests; on the contrary, " the 2nd Defendant is now maintaining his rights as an undivided " member, notwithstanding such residence apart from his father. The " legal consequence of the absence of 2nd Defendant's consent to the " said Deed, has therefore to be determined."

7. The Court of Sudder Udalut observe that the fact that the 2nd Defendant lived separately from his father, the 1st Defendant, affords no proof that they were divided in interest. Towards the Sale of family property the consent of the 2nd Defendant or the existence of some family necessity was in law necessary, and such consent not having been obtained nor the latter condition proved, the Sale is void.

8. The Decrees of the Lower Courts in recognition of the goodness of the Sale being hence erroneous, the Court of Sudder Udalut reverse the same and dismiss the Suit with costs.

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No. 16 of 1855.

Decree dated 27th March, 1855. *Page* 66, *M. V.*

1. The Original Suit was instituted by the Special Appellant, before the District Moonsiff of Betutnaad to obtain possession of certain land on payment of the balance due on account of a mortgage, less a certain sum claimable by Petitioner on account of Micharom, and on payment of the value of the buildings erected thereon by the present occupants.

2. The Plaintiff sued to recover by virtue of the purchase by him of the property on jeum, and the Pundit Sudder Ameen gave Judgment in his favor.

3. On Appeal, this Decree was reversed by the Civil Judge, who held that Petitioner had purchased only a right of action from a party not in possession of the land sued for, which right the Civil Judge considered to be not saleable.

4. The Civil Judge further stated it as his opinion that "a party must prove his right when disputed, before he is entitled to sell it."

5. From this decision a Special Appeal was sought for on the grounds:

1st. That the Civil Judge in not deciding who was the rightful owner of the land, had failed to determine the material points at issue in the case.

2nd. That the Civil Judge's ruling that a party before being entitled to sell his alleged but disputed right to any property must prove that right, was at variance with the usage of the country and the Rules of the Courts, the purchaser of the alleged title being the proper person to bring the action to prove that title, and not the seller of it.

6. The Court of Sudder Udalut admitted a Special Appeal as they considered the Decree of the Civil Judge an erroneous one; non-possession not necessarily destroying the right of title to land.

7. The Court of Sudder Udalut are of opinion that the Civil Judge was in error in dismissing the Suit on the ground that the party from whom the Plaintiff derived his title to the land in issue was not in possession. Such a circumstance could in no way nullify the said

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title, if otherwise good, and the party having the title was at liberty to transfer it to another with all attendant risks.

8. The Court resolve therefore to remand the Suit to the Civil Judge in order that he may pass decision thereupon on its merits without reference to the above exception taken by him to the Plaintiffs' title which they over-rule.

No. 22 OF 1855.

DECREE DATED 4TH JULY, 1855. *Page* 93, *M. V.*

1. The Original Suit was instituted for the recovery of certain Puttah lands valued at Rupees 200 upon a Deed of Sale, together with the value of the produce of the said land for the year Sowmya (1849) valued at Rupees 100. Total Rupees 300.

The terms of the above Deed stipulated that the sum advanced (Rs. 200) should be repaid in 5 yearly instalments, or in default, the Puttah lands mentioned in the Deed were to be forfeited.

2. The Plaintiff urged that a period covering the time allowed for three out of five such instalments had passed without the receipt of any sum whatever from the Defendants, and that consequently they as mortgagees were foreclosed by the terms of the Deed.

3. The 1st Defendant answered that he was not foreclosed having paid two of the instalments due and was ready when the land yielded to pay the rest.

The 2nd Defendant answered that the bond was not his Deed, but 1st Defendant's only, they having altogether divided.

4. The Moonsiff decreed for Plaintiff. He discredited the payment of the two instalments pleaded by 1st Defendant, as well as the plea that division had taken place between the 1st and 2nd Defendants. Being therefore of opinion, that the provisions of the bond must be carried out, he awarded the mortgaged land to the Plaintiff.

5. On Appeal the Subordinate Judge remarked that the bond on which the present Suit was brought, was a species of mortgage bond re-

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sembling the conditional Deed of Sale called a Bay-Bilwuffa in Mahomedan Law, and doubting the legality under the Law of a stipulation of the nature entered in the document sued on, he took the opinion of the Mahomedan Law Officer, who declared the same unwarranted.

The Subordinate Judge then reversed the Original Decree, quoting in support of the Moofty's opinion the decision of the Sudder Udalut, in Decree No. 73 of 1851, which he took to contain a ruling to the same effect.

6. From this Decree a Special Appeal was admitted on the ground urged by the Petitioner in his Appeals, viz., that when Hindoos were the parties to a Suit all opinions as to the Law of the case must be taken under Clause first, Section XVI, Regulation III of 1802 from the Pundits, and not from the Expounders of the Koran, and that secondly, the Decree of the Sudder Udalut quoted by the Appeal Court in support of its decree, had been erroneously construed by that Court.

7. The Court of Sudder Udalut observe that the Acting Subordinate Judge was manifestly in error in disallowing the deed sued on, upon an objection taken under Mahomedan Law, the parties being Hindoos. The Sudder Udalut at the same time are of opinion that the said deed is not one to which effect can in equity be given. It provides that the Defendants shall pay off a debt incurred by them to the Plaintiff, by five annual instalments and that failing any instalment the land mentioned in the Plaint, shall vest absolutely in the Plaintiff. The terms of the deed are unusual and also inequitable, no provision being made for reimbursement to Defendants of instalments paid by them on the land becoming the Plaintiff's, by failure of a further instalment. As the case stands, the Plaintiff has been accounted by the Acting Subordinate Judge to have received two instalments amounting to Rupees 80, and on the failure of a third, the Plaintiff demands the land producing Rs. 100, together with one year's produce, the deed permitting him also to retain the said Rs. 80.

8. The Court of Sudder Udalut are of opinion that a contract so manifestly injurious to one of the contracting parties, cannot have been entered into by him with the knowledge of the consequences it might entail upon him, and feeling therefore unable to give effect to such a deed as that sued on, they resolve to affirm the decree of the Subordinate Court

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which dismisses the Suit leaving the Plaintiff at liberty to recover from the Defendants, what money may be due to him on the transaction in question.

No. 23 of 1855.

Decree dated 25th July, 1855. *Page* 109, *M. V.*

1. The Original Suit was instituted before the District Moonsiff of Betutnaud, by the Plaintiff (Special Appellant) as mortgagee to recover from the Defendants as Jenmekars and mortgagers, the sum of Fanams 2,369, being the amount of his (Plaintiff's) lien on 8 lands reported unremunerative, and of a centage fee paid by him to the Defendants on renewal of the "Kanom" or mortgage deed on the 6th July 1849.

2. The Defendants pleaded their non-liability for the mortgage amount to the Plaintiff, who held the land under the mortgage bond.

3. The District Moonsiff considered that the Defendant's plea was a sufficient answer to the Plaint, and dismissed the Plaintiff's Suit with costs.

4. The Plaintiff appealed from this Decree urging that it is at all times competent for a mortgagee or "Kanom Kar," to sue for the recovery of his "Kanom" money, and that this principle was recognised in the Decree passed by the late Provincial Court, in Appeal Suit, No. 7 of 1836, and in that of the Subordinate Judge in Original Suit No. 35 of 1850.

5. The Subordinate Judge held that the Plaintiff's claim was not sustainable in equity, and he affirmed the Original Decree.

6. A Special Appeal was preferred to the Court of Sudder Udalut, and admitted from the Decrees of the Lower Courts on the grounds, that the precedents quoted by the Petitioner in his Special Appeal support him in his argument that a Suit such as the present one is sustainable, one of the precedents thus quoted being a Decree of the Subordinate Judge himself.

7. The Court of Sudder Udalut find that the mortgage deed, contains no condition to prevent the mortgagee from demanding his money when it may seem fit to him to do so.

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8. They also observe that in Appeal Suit No. 7 of 1836, on the file of the late Provincial Court for the Western Division, and Original Suit No. 35 of 1850, on the file of the Subordinate Court referred to by the Plaintiff, wherein the subject of the Suits was identical with that of the present Suit, no plea was set up in opposition by the proprietors of the lands then in question, that it was contrary to the law or usage of the country that a mortgagee should enforce payment of his mortgage bond at will; neither do the Lower Courts in the present instance declare that there is any such restrictive law in force in the country.

9. The Court of Sudder Udalut consider the right of a mortgagee to enforce at any time the payment of his bond is inherent in him, while the bond in its terms may place no limitation upon such right, and that the reasons which have led the Lower Courts to disallow to the Plaintiff his right are of an arbitrary nature and not tenable in law.

10. The Court resolve consequently to Decree to Plaintiff the sum of his bond 2,060 Fanams, and interest thereon from the date when he may throw up the land for restitution thereof to the 1st Defendant.

11. The Court of Sudder Udalut disallow to the Plaintiff the sum of Fanams 309, said to have been paid by him as a fine for renewal of the bond in his name, there being no stipulation in the bond that the money should be refunded to him.

No. 37 of 1855.

Decree dated 1st August, 1855. *Page* 120, *M. V.*

1. The Original Suit was instituted by the Plaintiff, to recover from the Defendant Rupees 131-4-0, principal and interest due on a bond.

2. The Defendant in answer admitted the bond but pleaded that it was invalid, having been executed as a bribe offered to the Plaintiff, to procure his silence regarding some Maunium lands held by him (Plaintiff).

3. The District Moonsiff decreed in favor of the Plaintiff.

4. The Principal Sudder Ameen on Appeal called upon the Plaintiff

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to prove the payment of the money for which the bond had been executed, and on his failure to do so, reversed the Decree of the District Moonsiff.

5. The Court of Sudder Udalut admitted a Special Appeal, from this Decree on the ground urged, viz., the error of the Appellate Court in calling on the Plaintiff to substantiate a claim already shown in the bond, instead of addressing itself to the proofs of the plea set up by the Defendant.

6. The Court of Sudder Udalut are of opinion that as the Defendant has admitted execution of the bond, it rested with him to show why he should not be bound by the terms thereof. As he has failed thus to relieve himself from the obligation of the bond, the Court resolve to over-rule the Decree of the Principal Sudder Ameen and to affirm that of the District Moonsiff.

No. 43 of 1855.

Decree dated 1st August, 1855. *Page* 121, *M. V.*

1. The Original Suit was instituted by the Plaintiff, for the recovery from the Defendant of Rupees 30-5-1, due on a bond.

3. The District Moonsiff was of opinion that the Plaintiff had proved his claim and accordingly passed a Decree in his favor.

4. The Acting Subordinate Judge reversed this Decree, having considered that the Plaintiff's refusal to swear to his claim was suspicious, as also the fact of no mention being made in the bond of the purpose for which the money had been borrowed.

5. An Appeal from this Decree was admitted by the Court of Sudder Udalut on the ground that the Appellate Court was not justified in rejecting the bond on the grounds stated by that Court.

The Court of Sudder Udalut consider the objections taken by the Acting Subordinate Judge to the bond, to be of an untenable nature, the circumstaces which have led him to disallow the instrument being such as in no way affect its credibility. The Court of Sudder Udalut resolve therefore to set aside the Decree of the Acting Subordinate

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Judge and to affirm that of the District Moonsiff. The costs in Appeal and Special Appeal are to be borne by the Defendant.

No. 36 of 1855.

Decree dated 8th August, 1855. *Page* 125, *M. V.*

1. The Original Suit was instituted by the Plaintiffs to establish their right in preference to that of the Defendants to the possession and management of certain landed property pertaining to the two Illoms called Kypanjerry and Tottakarah Mahoor yielding an annual income of Rs. 1,636-15-7, Houses, Pagodas, waste land and Teak forest, Rupees 6,431-15-4½, and bonds to the amount of Rs. 1,342-13-8½.

2. The Plaintiff after narrating the family history of the aforesaid two Illoms down to the year 1805 proceeds to state, that in that year in order to keep up the succession of the Kypanjerry house, there being no living male member, the Plaintiff's father caused the 1st Defendant's father to marry into the Tottakarah house. The issue of this marriage, a son, succeeded in due time to the management, and held it until his death in 1843. The Plaintiff while admitting that the Defendants are by their right of performing certain ceremonies related to him, contends, that they are not related to the Illom referred to in the Plaint with which the Plaintiff is alone connected. The Plaintiff refers to one Savitry, the last heiress of the two Illoms, as having been supported by him, and to the orders of the Session Court regarding the complaints made by this female against the Defendants, in conformity with which the present action was brought to establish the Plaintiff's title to inherit the estate.

3. The Defendants denied the Plaintiff's alleged right of inheritance. They declared that they held the Tottakarah Mathoor Illom as their ancient family property, and that they had succeeded to the other Illom on the extinction of the direct heirs.

4. The Subordinate Judge observed in his Decree that so far as the oral evidence was concerned, the question as to which of the two parties to the Suit was the nearest collateral heir of the Original family was justly equally balanced, but that the documentary evidence produced by

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the Defendants, to show that their father and grand father managed the property after the death of the direct male heir of the Original family, was of a very trifling description and could not be allowed to outweigh the expressed will, and intention of Savitry, the last direct female heir of the Original family, who upheld the right of the Plaintiffs in preference to that of the Defendants. The Subordinate Judge accordingly decreed in favor of the Plaintiffs.

5. On Appeal this decision was confirmed by the Civil Judge.

6. On a Special Appeal being preferred by the Defendants from these decisions of the Lower Courts, the Court of Sudder Udalut admitted the same on the grounds, that the Lower Court appeared to have overlooked the fact, that the Defendants, as step sons of the female Savitry, had right of inheritance to her property in default of nearer heirs.

7. It appears agreed upon by both parties, that the Kypanjery Illom vested in Savitry, that in order to continue succession in the Illom, she, according to a custom of the caste of Namboodrees, introduced the Defendant's father to beget a son in and for the Illom; that he accordingly contracted a marriage, the fruit of which was a son named Kellan, and that the property then vested in the said Kellan, but on his death without issue reverted to Savitry.

8. The Senior Pundit who was present at the hearing of the Suit, has viewed the introduction of Kellan with the family as that of a son obtained by gift, and the succession to him of Savitry as taken by her in the light of his adoptive mother. Kellan, the Puudit explains, coming in thus as a gift, was cut off from alliance with his natural kindred. The claim of the Defendant, to succeed as his half brothers, is hence found to be an inadmissible one.

9. The Defendants still claim as the nearest relations of Savitry's husband, but as the Civil Judge has preferred the evidence offered in support of the Plaintiffs' pretensions as nearest of kin, this plea the Court of Sudder Udalut observe has been definitely disposed of.

10. The Court having thus no ground for interfering with the Decree of the Civil Judge, dismiss the Appeal with Costs.

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No. 27 of 1855.

Decree dated 15th August, 1855. *Page* 133, *M. V.*

1. The Original Suit was instituted by the Plaintiffs for the recovery from the Defendants of Rupees 770, being principal and interest due on a bond executed to him in July 1836. The conditions of the bond were that it was to be paid in six instalments and in default of regularity of payment the whole amount was to be paid on demand, only two payments having been made, the Suit was brought for the principal and interest remaining due after deducting part payments.

3. The Moonsiff pronounced the bond genuine but distrusting the evidence as to any part payments having been made dismissed the Suit as barred by the Statute of Limitations.

4. On Appeal the Principal Sudder Ameen remanded the Suit, calling on the Moonsiff to explain the grounds which had led him to reject the Plaintiff's testimony, which the Principal Sudder Ameen considered unimpeachable, as to part payments.

5. The Moonsiff on reviewing his former Judgment, reversed it, out of deference to the higher Court's opinion regarding the credibility of the witnesses. He took occasion however to observe that it was now obvious that the Plaintiff's cause of action arose not in 1836 when the bond was executed, but in 1842 the date of the last instalment being due.

6. The Principal Sudder Ameen, on Appeal from this revised Judgment of the Moonsiff, reversed the same, being of opinion that the cause of action arose on the first default of the Defendants to pay any one of the instalments provided for in the bond, and that consequently as the first default occurred more than 12 years previous to the institution of the Suit the case was barred by the Statute of Limitations.

7. The Court of Sudder Udalut admitted a Special Appeal from this decision, being of opinion that the Principal Sudder Ameen was in error in ruling that the enforcement of the penalty attached to the bond, namely, that on failure of any one instalment the bond might be levied in full, was imperative on the Plaintiff.

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8. The Court of Sudder Udalut consider the Principal Sudder Ameen to have been in error in dating the period for which the Statute of Limitations should run from the date of failure of payment of the first instalment of the bond sued on. The Court observe that the Suit might be for any instalment due from a period within the limits of the Statute. The plaint was filed on the 25th August 1851, and the Statute does not shut out the Plaintiff's claim to recover the sums of the three last instalments on the bond falling due on the 30th July 1840, 1841 and 1842.

9. The Court resolve consequently to remand the Suit to the Principal Sudder Ameen that he may decide on the merits of the bond as respects the above said instalments.

No. 44 of 1855.

Decree dated 15th August, 1855. *Page* 137, *M. V.*

1. The Original Suit was instituted by the Plaintiff against the Defendants to enforce the release of certain land mortgaged to the Defendants on payment of the mortgage amount and a further sum the estimated value of the improvements made by the mortgagees while in possession.

2. The Defendants admitted that they held as mortgagees under the Plaintiff, but pleaded that the improvements made by them were undervalued in the Plaint, and that, by the usage of the country the land mortgaged was not liable to be redeemed after a short incumbency by the mortgagees of four years only.

3. The District Moonsiff, decreed in favor of the Plaintiff who he considered to be clearly competent to redeem the land at his pleasure. The value of improvements the Moonsiff estimated by his Ameen.

4. On Appeal this Decree was affirmed by the Subordinate Judge.

5. The Court of Sudder Udalut admitted a Special Appeal from the decisions of the Lower Courts in order to determine the question of usage pleaded by the Defendants.

6. The Court of Sudder Udalut are of opinion that the question of usage involved in this Suit has been improperly dealt with by the Lower

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Courts. It is not denied that it is the prevailing usage in the country of the parties to the Suit that mortgages should run for a period of 12 years before the expiration of which the mortgagee cannot be displaced. It is objected that proof is wanting that the mortgagee paid a fee for the renewal of the mortgage. It appears to the Court that the deed having been renewed every necessary condition for renewal must be held to have been fulfilled.

7. The Suit having been brought before the term established by usage for the continuance of the mortgage had expired, the Court resolve in reversal of the Decrees of the Lower Courts to dismiss it with costs.

No. 63 of 1855.

Decree dated 15th August, 1855. *Page* 140, *M. V.*

1. The Appeal Suit was instituted before the Subordinate Judge of Mangalore, to obtain the reversal of an order No. 26 of 1854, of the Collector of Canara.

2. The circumstances out of which the Suit arose are as follows: On the death of one Pocrally (Special Appellant's late husband) the deceased's nephew claimed to succeed him to the prejudice of the widow (Special Appellant,) and prayed the Court under Act XIX of 1841 to put him in possession, but the Civil Judge refused to oust the deceased's widow, and referred the complainant to a regular Suit.

3. The village accountant in the face of this order, proceeded to collect the public Revenue from the nephew of the deceased Proprietor. The widow appealed to the Head Assistant Collector who ordered the Shanbogue to receive the kists as they fell due from Special Appellant, and this order was reversed by the Collector.

In Appeal Suit No. 12 of 1854.

4. The Subordinate Judge affirmed the decision of the Collector.

5. From this award a Special Appeal was admitted by the Court of Sudder Udalut on the ground of the irregularity of the proceedings of the Subordinate Judge in having treated an order passed by the Col-

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lector in the Revenue Department, in reversal of one passed by his Head Assistant, as an Original Decree.

6. The Court of Sudder Udalut find the proceedings in this Suit to have been wholly irregular. An Appeal Suit can only be instituted for redress against a Judicial Decree given in an Original Suit. In the present instance there has been no Original Suit, but the Appeal Suit has been lodged for reversal of an order passed by the Collector in his Revenue capacity and this in supersession of one given by his Head Assistant.

7. The Court of Sudder Udalut therefore resolve to set aside the Decree of the Subordinate Judge.

No. 52 of 1855.

DECREE DATED 22ND AUGUST, 1855. *Page* 146, *M. V.*

1. The Special Appellant, in bringing this action, sought to recover from the 1st and 2nd Defendants, jewels to the value of Rupees 707-8-0, some Palmyra timber valued at Rupees 40, certain lands and tenements worth Rupees 489-11-4, and compensation for loss of produce to the amount of Rupees 258-8. The property claimed was alleged by the Plaintiff to form part of the Estate of his late brother, who was the 2nd Defendant's father, and to have been illegally taken possession of by that Defendant and her husband, the 1st Defendant, Plaintiff being heir at law to all his deceased brother's property.

2. The 1st Defendant answered that the jewels claimed were never in his wife's possession; that the timber was his own, and that the house and lands sued for were given to his wife by her deceased father, a deed having been executed by the latter, respecting them, in the year 1844.

3. The Hindoo Sudder Ameen dismissed the Plaintiff's claim, being of opinion that the house and lands were the self-acquired property of the deceased Mootanavien, and therefore alienable at his pleasure, and that it had not been proved either that the jewels specified had ever been lent, as alleged, to the 2nd Defendant, or that the timber claimed belonged to the deceased.

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4. The Civil Judge concurred in the view taken by the Sudder Ameen, and rejected the Appeal with all costs.

5. The application for the admission of a Special Appeal from the Civil Judge's Decree was based on the following arguments: I, that the Lower Courts had erred in considering that the property, alleged by the Defendant to have been granted to his wife in 1844 by the deceased Mootanavien, was the self-acquired property of the latter; and II, that the family being undivided the deceased had not power under the Hindoo Law to alienate any part of the patrimonial Estate without the consent of the other members and co-parceners.

6. This application was at first rejected, but subsequently admitted, because it did not appear to the Court that the Civil Judge had any facts upon which to ground his conclusion that the property in question was self-acquired by the deceased Mootanavien.

7. The 1st Special Respondent argues that the property is clearly shown to have been self-acquired by the fact of Mootanavien having lived separate from the other members of the family and had the management of the disputed property, while his father managed the ancestral Estate. He also urges that no proof was adduced by the Plaintiff of the property sued for forming part of the family Estate.

8. On consideration of the record, the Court of Sudder Udalut do not find grounds for disturbing the Decrees of the Lower Courts. It does not appear that Mootanavien, when he made the gift to his daughter objected to by Plaintiff, was in management of any part of the family property—at that period Mootanavien was not the head of the family. His father was alive, and in fact survived him—Mootanavien lived apart, holding office under the Government, and the acquisition of the property in issue was made in his own name. The Lower Courts appear therefore to the Court of Sudder Udalut to have been justified in their conclusion that this property was acquired by Mootanavien irrespectively of the family funds, and that it was hence competent to him to bestow it in gift upon his daughter. The Court therefore dismiss the Appeal with costs.

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No. 95 of 1855.

Decree dated 29th August, 1855. *Page* 153, *M. V.*

1. This was an action for the recovery of Rupees 726-13-7, illegally collected under the head of Meerassy Nuzzers, from the Plaintiffs by the Defendants, and for an injunction exempting them (Plaintiffs) from any further collections on the same account.

2. The Principal Sudder Ameen dismissed the Suit.

3. On Appeal the Civil Judge, finding that an order of Government abolishing the payment of these Nuzzers had been issued, reversed the Decree of the Lower Court and made an award as sued for.

4. From this decision a Special Appeal was admitted by the Court of Sudder Udalut in order to determine the value to be given to the order of Government referred to.

5. The Court of Sudder Udalut are of opinion that the Civil Judge has decided this Suit in an improper manner. What he has viewed as an order of Government abolishing the Nuzzers in question appears to have been merely a letter addressed by them to one of their Officers in the year 1802, but which from that time to the present would seem never to have been acted upon. Moreover as the said Nuzzers formed part of the acknowledged revenues of the Estate at the time that it passed out of the hands of the Government, it is not apparent what right the Government could have to abolish them.

6. The Court of Sudder Udalut under these circumstances consider the Plaintiff's .Suit to be an unsustainable one, and they dismiss it with costs.

No. 62 of 1855.

Decree dated 5th September, 1855. *Page* 155, *M. V.*

1. This was a Suit brought by Plaintiff for the recovery of certain lands of an annual value which he claimed in right of his wife (2nd Plaintiff).

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2. The Moonsiff dismissed the Suit holding the claim barred by the Statute of Limitation, as he was of opinion that the cause of action rose in 1814.

3. This Decree was confirmed by the Principal Sudder Ameen, who however considered that the cause of action did not arise until 1831.

4. From these decisions the Court of Sudder Udalut admitted a Special Appeal, the Lower Courts appearing to be in error as to the time when the cause of action arose.

5. The Plaintiff's claim as derived through his wife, depends upon the title of the latter to certain property conferred upon her sister, Coopoomal, by their mother at her marriage, to which in default of nearer heirs, the Plaintiff's wife is declared to be inheritrix.

6. The Pundits of the Court of Sudder Udalut being present at the hearing of this Appeal, have declared that a sister has no right of inheritance to property conferred upon a female at her marriage. The claim of the 2nd Plaintiff is hence unsustainable, and on this ground the Court of Sudder Udalut will not interfere with the Decree of the Lower Courts, whereby the Suit has been dismissed.

No. 64 of 1855.

Decree dated 5th September, 1855. *Page* 156; *M. V.*

1. This was a Suit instituted by the Plaintiff, to recover from the Defendants, a sum of a Rupees 82-11-7, on account of dowry, as also maintenance during her separation from the 3d Defendant.

2. The Moonsiff, disallowing the plea urged by the Defendants, viz., the invalidity of the alleged marriage between the Plaintiff and the 3rd Defendant, and considering her entitled to the dowry and maintenance sued for, decreed accordingly.

3. This award was confirmed on Appeal by the Principal Sudder Ameen, who modified it to the extent of adjudging the 3d Defendant to bear all costs of the Suit.

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4. From these decisions a Special Appeal was admitted by the Court of Sudder Udalut, in order that the point might be determined as to whether the marriage of the Plaintiff to the 3d Defendant within 4 months and 10 days from the death of her first husband was valid under the Mahomedan Law.

5. The Cazee-ool-Coozat being present at the hearing of this Appeal, has declared that the marriage of the Plaintiff with the 3d Defendant was null and void, and that the Plaintiff has no claim for provision of any sort from the 3d Defendant.

6. The Court of Sudder Udalut resolve therefore, in reversal of the Decrees of the Lower Courts to dismiss this Suit with costs.

No. 66 of 1855.

Decree dated 5th September, 1855. *Page* 157, *M. V.*

1. This was a Suit instituted by the Plaintiff on behalf of her son a minor, for a share of family property valued at Rupees 291.

2. The Additional Sudder Ameen decreed in Plaintiff's favor.

3. Before the Appeal which was preferred from the above Decree came on for hearing, the minor son of the Plaintiff died, and the Defendant urged in support of his Appeal, that the child being dead, Plaintiff was only entitled to maintenance.

4. The Civil Judge upheld the Decree of the Additional Sudder Ameen, being further of opinion that the passing of the Original Decree constituted the minor son of the Plaintiff a divided member, and that on his demise, his mother the Plaintiff was as his heir entitled to the share of the property originally sought to be recovered.

5. From this Decree, Special Appeal was admitted by the Court of Sudder Udalut, in order that the decision of the Civil Judge that the passing of the Original Decree made the individual in question a divided member might be brought under review for the purpose of determining whether the same was sound in Law.

6. The Pundits of the Court of Sudder Udalut being present at the

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hearing of this Appeal have declared that as the Decree of the Sudder Ameen had not been carried into effect at the time of the demise of the Plaintiff's son, he is to be considered in accordance with the Hindoo Law, to have died as an undivided member.

7. The Court of Sudder Udalut resolve therefore in reversal of the Decree of the Civil Judge to dismiss this Suit with costs.

No. 75 of 1855.

Decree dated 5th September, 1855. *Page* 160, *M. V.*

1. The Original Suit was brought for a share of family property.

2. The Moonsiff held that Plaintiff being a childless widow had no legal claim upon the family estate, and dismissed her claim, decreeing that she should live in the family house and share in the profits of the trade, (that of barbers) carried on by the family.

3. The Subordinate Judge reversed the Decree of the Moonsiff, awarding to the Plaintiff the share of family property claimed, and which had been secured to her by the deed executed in her favor by the Defendant.

4. From this decision the Court of Sudder Udalut admitted a Special Appeal, in order to determine whether the Acting Subordinate Judge has been justified in Law in awarding to the Plaintiff part of the family property in lieu of maintenance, while the Defendant objects to the assignment to her of such property.

5. The Pundits of the Court of Sudder Udalut being present at the hearing of this Appeal, have declared the 1st Defendant to be bound under the deed given by him to assign to Plaintiff the land therein mentioned as a provision for her maintenance. The Court therefore have no ground for interfering with the Decree of the Acting Subordinate Judge, and dismiss the Appeal with costs.

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No. 81 of 1855.

Decree dated 17th October, 1855. *Page* 182, *M. V.*

1. The claim raised was for arrears of rent.

2. The Additional Sub-Collector passed an order for realization of the said arrears and his decision was confirmed by the Collector.

3. The matter was then brought in Appeal before the Civil Court where the order of the Collector was affirmed.

4. A Special Appeal was admitted by the Sudder Udalut from the Decree of the Civil Court, because they saw reason to question the legality of the proceedings, which had been instituted before the Tahsildar, instead of before the Collector, as required by Regulation V of 1822.

5. The Court of Sudder Udalut consider the proceedings held in this case irregular throughout. The decision of the Collector was not an Original Decree from which an Appeal lay to the Civil Court under Regulation V. 1822. It was not founded upon proceedings taken before the Collector himself as the said Regulation would require, and was furthermore not an Original decision, but one given on Appeal from an order passed by the Additional Sub Collector; and this come to not on an enquiry he had held, but on one instituted by the Tahsildar.

6. The Court resolve consequently to dismiss the Suit, and charge the Appellant, who preferred it, with all costs. Considering, however, that he instituted his Appeal through ignorance, the Court resolve to remit to him the value of the primary stamps used for the Appeal and Special Appeal Petitions.

No. 83 of 1855.

Decree dated 17th October, 1855. *Page* 183, *M. V.*

1. The Original Suit was brought by Plaintiff for the recovery of Rupees 125-1-9, principal and interest due on a bond, executed in his favor by the son (since deceased) of the 1st Defendant.

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2. The 1st Defendant denied the authenticity of the bond, and further pleaded his non-liability as he had not inherited any property from his deceased son.

3. The Moofty Sudder Ameen dismissed the Plaintiff's claim. This Decree was on Appeal reversed by the Civil Judge on the ground that the money for which the bond had been given was borrowed for the use of the family.

4. From the Decree of the Civil Judge a Special Appeal was admitted by the Court of Sudder Udalut, in order to determine whether the Civil Judge was correct in viewing the debt as a family one, the 1st Defendant's signature to the bond not having been affixed.

5. The Court of Sudder Udalut are of opinion that the Decree of the Moofty Sudder Ameen was passed upon sound grounds, and that the Civil Judge has erred in law in making the Defendants liable for the bond sued on.

6. The 1st Defendant was the head of the house, and a bond by the deceased, his son, could not be binding on the 1st Defendant or on the family property.

7. The Court therefore affirm the decree of the Moofty Sudder Ameen which dismisses the Suit, the costs in Appeal and Special Appeal are to be paid by Plaintiff.

No. 89 of 1855.

Decree dated 17th October, 1855. *Page* 184, *M. V.*

1. The Original Suit was instituted by the Plaintiff for the recovery, under a Bill of Sale, of certain houses and a plot of ground valued at 1,500 Rupees.

2. The Subordinate Judge dismissed the Plaintiff's Suit.

3. On Appeal, the Civil Judge reversed the Decree of the Subordinate Judge and gave Judgment for the Plaintiff.

4. From this Decree a Special Appeal was admitted by the Court of Sudder Udalut, as the interests of a minor, the 2d Defendant, whose property was disposed of had not been sufficiently taken into consider-

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ation, and as there had been no delivery to Plaintiff of the Deed of Sale on which he had brought the Suit.

5. The Court of Sudder Udalut are of opinion that the 1st Defendant is not competent to call in question his act of sale of the property in issue, because of the minority of the 2d Defendant. The plea, if it be taken, must be so by some other party than the author of the act himself.

6. As respects the completeness of the purchase the Court observe, that the transaction was not brought to a conclusion, since no delivery of the Deed was made. They consequently declare the said transaction void, but as it has been established before the Civil Judge that the purchase money, Rupees 1,500, was received by the 1st Defendant, they decree that he repay the same to the Plaintiff with interest from the 2d September 1853, being the date of receipt up to date of the execution of this Decree.

No. 91 of 1855.

Decree dated 17th October, 1855. *Page* 186, *M. V.*

1. The Original Suit was instituted by the Plaintiff, for the recovery from the Defendant of Rupees 69-8-0, principal and interest due on a bond executed by him.

2. The Defendant denied the Plaintiff's claim.

3. The District Moonsiff dismissed the Plaintiff's claim, considering the bond sued a forgery.

4. On Appeal, the Acting Subordinate Judge reversed the Decree of the District Moonsiff, on the grounds that the signature affixed to the bond and that by the Defendant to his deposition before the Court corresponded so closely, as to induce him to conclude that the bond was his (Defendant's) deed.

5. The Court of Sudder Udalut admitted a Special Appeal from this Decree, the Acting Subordinate Judge having based his Decree on a comparison of signatures which afforded no evidence that the bond, which he otherwise viewed with distrust, had been executed by Defendant.

6. The Court of Sudder Udalut are of opinion that the grounds taken by the Acting Subordinate Judge do not justify his deciding on the

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goodness of the bond sued on. The Moonsiff considered the bond to be a forged one and the Acting Subordinate Judge viewed the direct evidence adduced with distrust; but on the statement of certain individuals casually present in Court, as to the apparent correspondence of the signature to the bond with that attached by the Defendant to a deposition given by him, the Acting Subordinate Judge concluded that he was bound to accept the bond as a genuine one. The Court of Sudder Udalut observe that such comparison of signatures in itself affords no evidence in establishment of a bond. The result thereof is a mere matter of opinion and no ascertainment of a fact on which a Decree can be given.

7. The execution of the bond by Defendant not having been established, the Court resolve to set aside the Decree of the Acting Subordinate Judge and to uphold that of the District Moonsiff, which dismisses the Suit with costs.

No. 132 of 1855.

Decree dated 12th November, 1855. *Page* 193, *M. V.*

1. This is an application for the admission of a Special Appeal from the decree of the Subordinate Judge in Appeal Suit No. 303 of 1854.

2. The object of the action was to establish the liability of a certain garden to be sold in execution of a decree of Court, and to obtain the annulment of another decree on the ground that the Suit was collusive.

3. The District Moonsiff decided for the Plaintiff and his judgment was confirmed by the Subordinate Judge.

4. Petitioner now urges that the Appellate Court was not justified in dismissing his appeal, solely on the ground that he had not defended the Original Suit.

5. The Court of Sudder Udalut seeing grounds for remanding the Suit, directed that a notice to show cause against such remand should be served on the Respondent. This has been duly performed, without however eliciting any answer.

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6. The Court of Sudder Udalut are of opinion that notwithstanding the default of the 1st Defendant the Subordinate Judge should have pronounced judgment on the merits of the case, in view of the record as it stood. The Court therefore resolve to remand the Suit for such judgment.

No. 106 of 1855.

Decree dated 14th November, 1855. *Page* 198, *M. V.*

1. The Original Suit was instituted by the Plaintiff as widow of an undivided brother of the Defendants, for a share in the family property.

2. The Principal Sudder Ameen was of opinion that the Plaintiff was entitled to the share she claimed and passed a decree in her favor.

3. On Appeal the Civil Judge upheld the decree of the Principal Sudder Ameen.

4. From the decisions of the Lower Courts, the Court of Sudder Udalut admitted a Special Appeal as they were apparently opposed to Hindoo Law.

5. The Court of Sudder Udalut find it necessary to reverse the decrees of the Lower Courts. The Plaintiff as a widow is not by law entitled to a share in the property which remained undivided at the demise of her husband, but only to maintenance.

No. 112 of 1855.

Decree dated 5th December, 1855. *Page* 233, *M. V.*

1. This was a Suit for ejectment, and recovery from the 1st Defendant, the occupant of the land, of certain sums paid by Plaintiff for the Government Assessment, Plaintiff resting his claim on a deed of sale.

2. The 1st Defendant pleaded that he was in possession in vir-

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tue of a deed of Sale, and did not simply hold a mortgage on the property, as alleged in the plaint.

3. The District Moonsiff gave Judgment for the Plaintiff.

4. In Appeal this decision was reversed and the Suit dismissed.

5. The Court of Sudder Udalut admitted a Special Appeal because the Subordinate Judge in dismissing the Plaintiff's plea of purchase had not done so on any conclusive ground.

6. The Court of Sudder Udalut observe that pursuant to Act No. 1 of 1813, the deed of Sale pleaded by the 1st Defendant is void from its being unregistered and opposed by that adduced by the Plaintiff which has been duly registered. On this ground, the Court set aside the decree of the Subordinate Judge, and affirm that of the District Moonsiff. The costs in Appeal and Special Appeal are to be paid by the 1st and 4th Defendants.

No. 113 of 1855.

Decree dated 5th December, 1855. *Page* 234, *M. V.*

1. The Original Suit was instituted by Plaintiff for the recovery, from the Defendants, six in number and an undivided family, of Rupees 64, being principal and interest due upon a mortgage bond executed by the 1st Defendant.

2. The 1st Defendant pleaded that the amount sued for had been repaid.

3. The 4th and 5th Defendants declared the bond a forgery, and that even supposing the bond genuine, the 1st Defendant had no right to mortgage the land.

4. The District Moonsiff being of opinion that the Plaintiff had proved his claim, gave a decree in his favor.

5. On Appeal, the Principal Sudder Ameen modified the Decree of the District Moonsiff relieving the 2d, 3d, 4th, 5th and 6th Defendants of their liability for the amount claimed and declared the 1st Defendant (but not his share of the family property) liable for the amount sued for.

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6. From this Decree a Special Appeal was admitted in order to decide upon the liability of the 1st Defendant's share of the property for the debt.

7. The share of an individual in joint family property being liable for demands against him, the Court of Sudder Udalut amend the Decree of the Principal Sudder Ameen by adjudging that the share of the 1st Defendant be held available for the satisfaction of the Judgment passed against him.

No. 114 of 1855.

Decree dated 5th December, 1855. *Page* 236, *M. V.*

1. The Suit was instituted by Plaintiff for the recovery from the Defendants, 6 in number and an undivided family, of Rupees 196-3-9, being principal and interest due upon a mortgage bond executed by the 1st Defendant.

2. The 2nd, 4th and 5th Defendants declared the bond a forgery made to defraud them and the 3rd and 6th Defendants of their share in the common family property.

3. The District Moonsiff being of opinion that the Plaintiff had proved his claim, gave decree in his favor.

4. On Appeal, the Principal Sudder Ameen modified the Decree of the District Moonsiff relieving the 2nd, 3rd, 4th, 5th and 6th Defendants, of their liability for the amount claimed, and declared the 1st Defendant, but not his share of the family property, liable for the amount sued for.

5. From this decree, a Special Appeal was admitted in order to decide upon the liability of the 1st Defendant's share of the property for the debt.

6. The share of an individual in joint family property being liable for demands against him, the Court of Sudder Udalut amend the Decree of the Principal Sudder Ameen, by adjudging that the share of the 1st

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Defendant be held available for satisfaction of the judgment passed against him.

No. 147 of 1855.

Decree dated 10th December, 1855. *Page* 237, *M. V.*

1. The Plaintiff sued on an instalment bond. The Principal Sudder Ameen gave judgment for the Plaintiff. This decision was reversed in Appeal by the Civil Judge, on the ground that the claim was barred by the Satute of Limitations.

2. The Plaintiff now urges that as the last instalment did not fall due till two years after the institution of his Suit, his claim was not affected by the Limitation Rules; and that even did they bear upon the case, they would only render irrecoverable those instalments which had been due longer than the period therein laid down.

3. The Court of Sudder Udalut are of opinion that the Plaintiff is entitled to recover such of the instalments not due for a period exceeding 12 years when his Suit was instituted. They therefore see ground to remand the Suit to the Civil Judge for Decision on the merits as to these two instalments.

No. 148 of 1855.

Decree dated 10th December, 1855. *Page* 238, *M. V.*

1. The Plaintiff sued Petitioner and another for recovery of Rupees 59-13-10, being partly Meerassy and partly land rent, also of certain Malgoozary wet and dry lands, of a garden well, and of Rupees 23-3-3, the income of a Curnum, Meerassy due to her in arrears from Fusly 1259.

2. The District Moonsiff being of opinion that the Plaintiff was entitled to maintenance from the 1st Defendant, in proportion to the amount of the property, and observing that the annual profit derivable from the land might perhaps in some years be insufficient to cover the

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amount of maintenance, and the land thereby become liable to sale, awarded that ⅓rd of the land be made over to Plaintiff for her maintenance, that the Curnum Meerassy be enjoyed by the 1st Defendant, that puttahs be issued in the names of the parties, and that, in case of the demise of either party, the survivor should succeed.

3. This Decree was, in Appeal, confirmed by the Acting Subordinate Judge.

4. The Petitioner in support of his present application urges that, under Hindoo Law, the mother-in-law has no right to a share of the property of an undivided family, but can only claim maintenance, and that it was therefore illegal to award to her ⅓rd of such property.

5. The Decrees of the Lower Courts awarding to the Plaintiff a share in the family property, not being in accordance with Hindoo Law, the Plaintiff having no other right than that of maintenance, the Court of Sudder Udalut were of opinion, that the Suit should be remanded with a view to the District Moonsiff awarding her such maintenance as might appear fitting and a notice was accordingly issued to the Special Respondent.

6. The notice having been duly served upon the said Special Respondent, the Court of Sudder Udalut resolve to remand the Suit to the District Moonsiff for re-investigation in reference to the foregoing remarks.

1856.

No. 116 of 1855.

Decree dated 16th January, 1856. *Page* 1, *M. V.*

7. The Court of Sudder Udalut observe, that the Acting Civil Judge has been in error in deeming the land in issue unsaleable to the Plaintiff because of the seller, the 2nd Defendant, having a debt to discharge to another party, namely, the 1st Defendant. The land not having been pledged for the said debt, it was open to the 2nd Defendant to dispose thereof.

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No. 139 of 1855.

Decree dated 16th January, 1856. *Page* 5, *M. V.*

1. The Original Suit in which the present Special Appellant was 2nd Defendant, was brought for a half share of ancestral property, the 2nd Plaintiff claiming as son of one Palamatta Gounden by his first wife, while the Defendants were his sons by his second wife.

2. The Defendants pleaded a division of family property in bar of the Plaintiff's claim, contending that Plaintiff's share according to the division amounted to one-sixth of the property only.

3. The District Moonsiff awarded to Plaintiffs a moiety of the landed property, on the grounds that it had been shown in evidence to be customary in the caste of the Plaintiffs to make a division of property according to the number of wives, and not according to the number of sons, and that to this arrangement both parties had agreed; but disallowed their claim to certain articles of moveable property.

4. On Appeal this Decree was confirmed by the Acting Subordinate Judge.

6. The Court of Sudder Udalut consider that the Lower Courts have erred in apportioning the shares according to the number of the mothers of the parties. It being a rule of Hindu Law that sons shall share alike according to the number thereof, and this rule being applicable to all castes without distinction. The Court of Sudder Udalut consequently assign to the 2d Plaintiff one-sixth of the property in issue, and as it does not appear that the Defendants have disputed the Plaintiff's title to this extent, they are relieved from all costs which are to be borne by the Plaintiffs.

No. 86 of 1855.

Decree dated 19th January, 1856. *Page* 8, *M. V.*

1. The Original Suit was instituted for the recovery from the Defendant as heir to his father the late Zemindar of Cavatenugger, of Rs.

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58,854-8-9, the balance of principal and interest due on a bond transferred to the Plaintiff, by the heir of the original grantee thereof.

2. The Suit was pronounced Exparte, against the Defendant.

3. The Civil Judge decreed as sued for, being of opinion that the Plaintiff had fully substantiated his claim.

4. From this Decree, an Appeal was preferred to the Court of Sudder Udalut on the grounds, that the Defendant had been improperly pronounced Exparte by the Civil Court; that the Suit was barred by the Statute of Limitations, no payments having been made for 27 years, and further, that one Suttyabomaboye, who had taken out letters of administration to the Estate of the original party who transferred the bond to Plaintiff, had brought a Suit on the bond now in issue, and that the two Suits should have been decided together.

5. The Court of Sudder Udalut see no cause to disturb the Judgment of the Lower Court in this Suit. The neglect of the Defendant's father to defend the Suit in the first instance, or to appeal against the order of the Lower Court refusing to allow him on his application, to put in his answer, cannot be remedied in appeal, and the request of the Defendant for a further investigation of the merits by the Lower Court is therefore inadmissible.

No. 127 OF 1855.

DECREE DATED 30TH JANUARY, 1856. *Page* 13, *M. V.*

1. The Original Suit was instituted for the recovery of Rupees 20, principal and interest due on a transfer bond.

2. The Defendant admitted the bond, but pleaded a partial liquidation thereof.

3. The Sudder Ameen passed a Decree in favor of Plaintiff with costs.

4. The Civil Judge on Appeal reversed the Decree of the Lower Court, with costs to be paid by the Plaintiff.

5. From this Decree a Special Appeal was admitted by the Court of Sudder Udalut as it appeared that the Civil Judge had admitted as evidence of the part payment made by Defendant, an account prepared by him.

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6. The Pundits of the Sudder Court having been consulted, have declared that a written evidence of debt cannot be set aside, but on cancelment of the document or production of a written discharge. The Defendant having no such proof of release from the bond to produce, the Court of Sudder Udalut consider the bond to be valid against him. They therefore reverse the decision of the Civil Judge, and uphold that of the Sudder Ameen.

No. 141 OF 1855.

DECREE DATED 30TH JANUARY, 1856. *Page* 14, *M. V.*

1. This is a Suit for ejectment, Plaintiff seeking to recover from the Defendants possession of a room and verandah, in a house purchased by him of the 7th witness Oonamalay, and let to the Defendants who failed to pay their rent, Plaintiff also sues for the arrears of rent due to him.

2. The Defendants deny the Plaintiff's claim, the 1st Defendant declaring that he rented the premises of the 3rd Defendant from whom the 7th witness, the widow of 3rd Defendant's brother, received maintenance.

3. The 2nd Defendant urged that the premises were mortgaged to him by the 3rd Defendant with power of redemption within a certain time.

4. The 3rd Defendant declared that the property belonged to his family, he and his brothers having been undivided, and that the 7th witness had no right to alienate the property.

5. The Moonsiff considered the 7th witness had power to dispose of the property, he therefore decreed as sued for by Plaintiff.

6. The Acting Subordinate Judge confirmed the Decree of the Moonsiff.

7. From these Decrees of the Lower Courts a Special Appeal was admitted by the Court of Sudder Udalut as the Pundits had declared the sale of the property by 7th witness invalid.

8. The Court of Sudder Udalut observe, that by Hindoo Law, a widow cannot alienate immoveable property but with the consent of her heirs. The Plaintiff's title derived from Oonamalay widow of 3rd Defendant's brother, without such consent is therefore void. The Court consequently reverse the Decrees of the Lower Courts and dismiss the Suit.

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No. 143 of 1855.

Decree dated 30th January, 1856. *Page* 16, *M. V.*

1. The Plaintiffs sued for ejectment of the Defendants from certain lands specified in the Plaint, for recovery of Rupees 3-12-0, arrears of rent alleged to be due on the said land and for the removal by the Defendants of the buildings erected thereon.

4. The District Moonsiff disallowed the Plaintiffs' title to the land, but adjudged the arrears of rent as sued for.

5. From this Decree the 4th Defendant appealed and the Principal Sudder Ameen reversed the Original Decree, dismissing the Plaint with all costs against the Respondents.

6. A Special Appeal preferred by the Plaintiffs from the Principal Sudder Ameen's award was admitted by the Court of Sudder Udalut in order to determine the value due to the lease executed by the 1st Defendant's father, and the admissions made by certain of the Defendants.

7. The Court of Sudder Udalut find this Suit to have been an irregular one. It was instituted against several individuals with distinct interests—each having a holding of his own, and these should have been proceeded against by separate actions. The Defendants however, with the exception of the 4th, submitted to the District Moonsiff's Decree and the decision as respects them cannot consequently be interfered with. The Court have only therefore to declare that the said Decree cannot affect the 4th Defendant who appealed therefrom. As regards the other Defendants they reverse the Decree of the Principal Sudder Ameen and uphold that of the District Moonsiff.

No. 136 of 1855.

Decree dated 13th February, 1856. *Page* 19, *M. V.*

1. The Original Suit was instituted by the Plaintiffs, for the recovery of a moiety of the real and personal property valued at Rupees 3,177-7-0, left by the 1st Plaintiff's paternal-grandfather.

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3. The Principal Sudder Ameen decreed to the Plaintiff the entire real property sued for and such portion of the personal property as had been deposited in Court and rejected the 2d Defendant's claim.

4. On Appeal, this Decree was confirmed by the Civil Judge.

5. From these Decrees an Appeal was admitted by the Court of Sudder Udalut in order to judge of the value of the 1st Plaintiff's withdrawal of his claim after the age of 17.

6. The Court of Sudder Udalut observe that the 1st Plaintiff's admission of the 2d Defendant's title to the house and two shops claimed in the Suit is properly binding upon him. The Plaintiff was at the time 17 years of age and by Hindoo Law had attained his majority. The Court therefore dismiss the Suit as respects the above premises and require the 1st Plaintiff to pay the 2d Defendant's costs throughout the Suit.

No. 142 of 1855.

Decree dated 13th February, 1856. *Page* 20, *M. V.*

1. The Original Suit was instituted for the recovery of certain property valued at Rupees 1,597-8-9, which the Plaintiff claimed under a Will, as being the adopted son of the testator.

2. The 1st Defendant, in bar of the Plaintiff's claim pleaded the prior adoptive right of her late husband to the property, declaring the Will under which the Plaintiff claimed, false, and his adoption, illegal.

3. The Subordinate Judge considered the Will, and the Plaintiff's adoption proved, and, on reference the opinion of the Hindoo Law officers of the Court of Sudder Udalut, confirmed his right of inheritance.

4. On Appeal, the Civil Judge confirmed the Decree of the Subordinate Judge.

5. From the dicisions of the Lower Courts, the Court of Sudder Udalut admitted a Special Appeal, as they saw reason to question the soundness of the Hindoo Law, on which the award had been based.

6. The Court of Sudder Udalut do not approve of the opinion given by their Pundits in this case, on which the Lower Courts have acted. The

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second adoption being invalid by cause of the existence of the son first adopted, no change of circumstance, such as the demise of the son first adopted, could render the said invalid adoption a valid one.

No. 146 of 1855.

Decree dated 13th February, 1856. *Page* 22, *M. V.*

1. This was a Suit for maintenance. The Plaintiff sued on a Kararnamah, signed by the 1st Defendant engaging conjointly with the 2nd Defendant (Plaintiff's husband) to pay her maintenance.

3. The Moonsiff decreed in favor of Plaintiff.

4. On Appeal, this Decree was confirmed by the Subordinate Judge.

5. From these Decrees the Court of Sudder Udalut admitted a Special Appeal, the Lower Courts having been in error in holding 1st Defendant liable for the maintenance of the Plaintiff during her husband's life-time.

6. The Court of Sudder Udalut observe that the Decrees of the Lower Courts in so far as they hold the 1st Defendant liable for the maintenance of the 2nd Defendant's wife are clearly opposed to Hindoo Law; according to which the husband alone, while alive, is bound to make provision for his wife.

7. The Court resolve therefore to exempt the 1st Defendant from the Plaintiff's demand, and to require the Plaintiff to pay her costs.

No. 125 of 1855.

Decree dated 27th February, 1856. *Page* 26, *M. V.*

1. The Original Suit was instituted by the Plaintiffs, the 1st, 2nd and 3rd Sons by the first wife of one Pallikondy Coonjoossa, for the recovery from the first Defendant, of certain bequests amounting to Rupees 3,000, made in favor of them by their father.

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3. The Principal Sudder Ameen awarded to Plaintiffs the sums claimed by them.

4. On Appeal this decree was confirmed by the Civil Judge, who remarked that among the Moplah families of Malabar, the ordinary Mussulman Law must be held to prevail when not contravened by local usage.

5. From these decrees of the Lower Courts, the Court of Sudder Udalut admitted a Special Appeal as they questioned the propriety of two distinct laws of inheritance prevailing in the same family.

6. The Court of Sudder Udalut find it necessary to set aside the decrees of the Lower Courts. The parties to the Suit are governed by the law of Maroomakatayem pursuant to which, as being a branch of Hindoo law, effect cannot be given to a Will. By this law a gift might be made of such property as was under the absolute control of the giver, but to constitute a gift, possession must have been conferred. In the present instance right by gift is not pleaded but right by bequest, and that pursuant to Mahomedan law; such a right in a family governed as that in question cannot, the Court feel satisfied, be upheld in law, and they resolve therefore to dismiss the Suit.

No. 151 OF 1855.

DECREE DATED 27TH FEBRUARY, 1856. *Page* 30, *M. V.*

1. This is a Suit of Ejectment.

2. The Plaint set forth that the Jenmum title to the land in issue had always rested with the Plaintiff's family, that the transfer alleged to have been made by the Plantiff's Karnaven in favor of the 2nd and 3rd Defendants could not without the concurrence of the other members of the family be held valid, and that the said 2nd and 3rd Defendants have no title or interest in the land.

3. The 2nd Defendant in answer opposed the Plaint averring that he succeeded to the property on failure of direct heirs, a deed of gift being made out in his name by the two leading managers or heads of the family,

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and further questioned the Plaintiff's right to sue independently of the 7th, and 8th Defendants, members of the same family and senior to him.

5. The Acting Moonsiff awarded restoration as sued for.

6. The Principal Sudder Ameen on Appeal preferred by the 2nd Defendant reversed the foregoing Decree, holding that the deed of gift bearing the signature of the principal member of the family and of his immediate Anandraven was valid and binding and could not be affected by the absence of the assent of the Plaintiff and 7th Defendant. He moreover declared the suit to be barred by the Limitation Rules and dismissed the Plaintiff's claim with all costs.

7. From this Decree, a Special Appeal was admitted by the Court of Sudder Udalut who now proceed to give judgment.

8. The Court of Sudder Udalut are of opinion that the deed of gift on which the 2nd Defendant bases his claim to the property in issue is invalid under the Law of Maroomakatayem, as the Plaintiff and 7th and 8th Defendants' important Anandravens in the family of the donor, did not assent thereto. The Court resolve therefore to set aside the Decree of the Principal Sudder Ameen and to affirm that of the District Moonsiff.

No. 17 of 1856.

Decree dated 10th March, 1856. *Page* 37, *M. V.*

4. The Civil Judge appears to have rejected document 20, being a deed of sale, because mention thereof was not made in document 18, being a deed executed on the re-sale of the property to which No. 20 relates. It appears to the Court of Sudder Udalut that the objection above taken to document 20, is not sound in law, and they resolve therefore to remand the Suit to the Civil Judge in order that he may pronounce afresh upon the goodness of the said document, and the title dependant thereon.

No. 18 of 1856.

Decree dated 10th March, 1856. *Page* 3, *M. V.*

4. The Court of Sudder Udalut resolve to remand the Suit to the Moofty Sudder Ameen in order that the witnesses for the Defendant un-

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examined by him may be examined, it not being within the discretion of the Sudder Ameen to dispense with witnesses relied upon by the parties citing them.

No. 145 of 1855.

Decree dated 22nd March, 1856. *Page* 46, *M. V.*

1. The Original Suit was instituted to set aside the 1st Defendant's pretensions of right over certain lands, the Zenm of the 2nd Defendant and rented by her to a third party (deceased) the grand-aunt of the 4th and 5th Defendants.

2. The 1st Defendant in answer alleged that her father had obtained a lease of the land some 47 years ago, and that all the improvements had been effected by herself and her father at their own expense.

3. The other Defendants supported the Plaint, the 2nd Defendant adding that patom was paid her by the 3rd Defendant, and that the 1st Defendant's father formerly lived in the Paramba, but left it long ago.

4. The Moonsiff adjudged the lands to Plaintiff and further awarded to 1st Defendant the value of improvements made thereon amounting to Rupees 104-9-4.

5. The Subordinate Judge in Appeal confirmed the foregoing Decree.

6. The Court of Sudder Udalut admitted a Special Appeal in order to decide whether the Plaintiff as a mere holder of a lease has the right to dispossess the 1st Defendant, who maintains her right to the occupancy on an equivalent title.

7. The Court of Sudder Udalut are of opinion that the Plaintiff as a simple Tenant is not empowered to oust the 1st Defendant, who possesses an equivalent title, it being for the jenmy to effect the ousting if called for.

The Court therefore dismiss the Suit with costs.

No. 97 of 1855.

Decree dated 9th April, 1856. *Page* 55, *M. V.*

1. The Original Suit was instituted by Plaintiff to establish her title to the Huckdarship of the Coonnaloor Choultry, as also for mesne pro-

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fits which had accrued during the period the Plaintiff and her adopted son had been unlawfully kept out of possession by the Defendant since the death of her husband, the late Huckdar.

3. The Subordinate Judge pronounced the office hereditary and confirmed the Plaintiff's title thereto, but awarded her only half the mesne profits claimed on the ground that the duties of the office had been performed by another party during the period for which she demanded them.

4. The Civil Judge in Appeal reversed the foregoing decision, observing that Plaintiff's husband, whatever his original title may have been, had acquiesced in the acts of the Collectors who had, since 1802, assumed the right to nominate the management of all Chuttrums or Chuttrums' estates, and that in such circumstances, the present Defendant was justified in the supersession of Plaintiff and her adopted son.

5. From this decree, the Court of Sudder Udalut admitted a Special Appeal and remanded the suit to the Civil Judge for his opinion as to the validity of the adoption pleaded by the Plaintiff upon the admissibility of which her claim to nominate to the office depended.

6. In his revised decree the Civil Judge on a consideration of the evidence for the adoption was of opinion that the same was not satisfactorily proved, and he gave judgment that the Court of Sudder Udalut having ruled the office to be hereditary, the Plaintiff should be put into the same making due provision for the discharge of its duties.

7. An Appeal having been preferred from this revised decree, the suit was again remanded by the Court of Sudder Udalut to the Civil Judge for a revision of judgment, as they observed that he had determined an important point in the suit, viz., the Plaintiff's right to succeed to the Huckdarship in spite of her sex, without giving parties the necessary opportunity of being heard upon it; and they accordingly directed him to proceed to pass judgment afresh on the receipt of any such evidence as might be adduced upon this point.

8. The Acting Civil Judge having represented that he had been made, while the suit was pending before the Court of Sudder Udalut, a Special Respondent in the case, it was called up before the Court of Sudder Udalut for decision before them.

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9. The Court of Sudder Udalut are of opinion that the decree of the Civil Judge should be upheld. The decision of the Court of Sudder Udalut in Appeal Suit No.* 74 of 1853, shows that Meerassee offices of even a more important description than the one now in question may vest in females, the duties of the office being discharged by deputy. There is nothing in the record of this suit to make it apparent that the office in issue is one that may not be so provided for. The Court of Sudder Udalut therefore dismiss the Appeal with costs.

No. 152 of 1855.

Decree dated 9th April, 1856. *Page* 58, *M. V.*

1. The Suit was instituted by the Plaintiffs to recover from the 1st Defendant, certain lands mortgaged in 1816 to one Kristnamal, whose heir 1st Defendant was, on which lands Plaintiffs declared 1st Defendant had no longer any claim.

4. The Principal Sudder Ameen dismissed the Suit as barred by the Statute of Limitations, observing that mortgage claims were exempted by the Law of the country, from the operation of the statute only in such cases as when the mortgager might have obtained a counter agreement from the mortgagee, and in the present case no agreement of this kind had been obtained.

5. In appeal, this decision was confirmed by the Civil Judge.

6. From these Decrees of the Lower Courts, a Special Appeal was admitted by the Court of Sudder Udalut, as it appeared to them to be requisite that the chief point at issue, viz., the liability of the land to redemption, should receive further and full consideration.

7. The Court of Sudder Udalut are unable to concur in the decision of the Lower Courts as to the force of any such usage as forms the grounds of their Decrees. The purpose of a counterpart deed, such as they advert to, is to assure the mortgager of the land from fraud by the mortgagee in tampering with the mortgage bond as to its amount or conditions, and as all mortgages are ordinarily redeemable after any lapse of time, it does not require that power to redeem should be kept open by specific deed. The Court are of opinion therefore that the Lower Courts

* Vide page 154.

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have not been warranted by any usage of the country in regard to counterpart deeds in bringing the mortgage in issue within the scope of the Statute of Limitations.

8. The Court of Sudder Udalut hold that the Plaintiff's claim is an actionable one, and resolve to remand the Suit to the Principal Sudder Ameen for decision on its merits.

No. 35 OF 1856.

DECREE DATED 17TH APRIL, 1856. *Page* 63, *M. V.*

1. This was a Suit for the recovery of a certain spot of ground and some building materials, usurped by the Defendants.

2. The Moofty Sudder Ameen adjudged that the ground should be restored to the Plaintiff but disallowed his claim to the building materials.

3. In Appeal, the Civil Judge dismissed the suit on the grounds that Plaintiff was not competent to sue individually, the land having been granted to a section of the community of which he was only a member, and that other Defendants should have been included.

4. Plaintiff now urges that the reasons assigned by the Civil Judge were not sufficient to justify him in dismissing the suit, and that he afterwards presented a fresh plaint which was not received.

5. The Court of Sudder Udalut seeing grounds for remanding the suit to the Civil Judge, caused a notice to be issued to the Respondents to shew cause why that should not be done. No motion has been filed by the Respondents in reference to such notice.

6. The Court of Sudder Udalut observe, that as the Plaintiff was interested in the appropriation of the land in issue to a public purpose, he was at liberty to sue to have the said purpose carried out, and that it was not necessary to that end that all similarly interested with himself in the matter should join in such a suit. The Court further observe that any omission on the Plaintiff's part to include as Defendants all who should have been proceeded against as such might have been remedied by supplementary pleadings. For the above reasons the Court resolve to remand the suit to the Civil Judge, with a view to its being replaced on the file and decided on its merits.

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No. 6 of 1856.

Decree dated 23rd April, 1856. *Page* 65, *M. V.*

1. The Suit was instituted by the Plaintiff to recover from the Defendant certain houses, jewels, &c. valued at Rupees 796-2-0 left to her by her mother.

2. Both the Lower Courts gave judgment against the Plaintiff.

3. From these Decrees, a Special Appeal was admitted by the Court of Sudder Udalut, the Pundits of their Court having declared that Plaintiff's adoption by the deceased Venca gave her right to inherit.

4. The Court of Sudder Udalut are of opinion that the Lower Courts have failed to pay attention to the essential merits of this case.

5. According to the opinion of the Senior Pundit who was present at the hearing of the Appeal, it matters not how the Plaintiff was admitted into the family of the Defendant's mother, whether by purchase or in any other manner. The point for consideration was whether she had been recognized by the said individual as her daughter, such recognition in the instance of dancing girls sufficing to constitute adoption without any formal act of adoption.

6. This point remains to be determined, and the Court of Sudder Udalut resolve therefore to remand the suit to the Principal Sudder Ameen for revision of judgment.

No. 133 of 1855.

Decree dated 26th April, 1856. *Page* 67, *M. V.*

1. The Suit was brought by Plaintiff before an European Court of Requests held, under the provisions of Act XI of 1841, at Secundrabad, to recover from the Defendant the amount of Rupees 733-5-3 principal and interest of money lent.

2. The Defendant denied the debt.

3. The Court gave an award in favor of Plaintiff, to the extent of Rupees 515-15-6.

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5. The Court of Sudder Udalut find that the only evidence in this case is the testimony of the Plaintiff, on oath, corroborated by his Account Books. This is not sufficient evidence on which to give an award against the Defendant who denies the debt. The Plaintiff is bound to prove the delivery of the money to the Defendant or the admission of the latter to the truth of the demand.

6. The Court of Sudder Udalut therefore resolve to remand the case to the Court of Requests with an injunction to them to call upon the Plaintiff to adduce evidence as to the truth of his claim and pass judgment de-novo.

No. 52 of 1856.

Decree dated 3rd July, 1856. *Page* 69, *M. V.*

1. The Plaintiff claimed to obtain possession of his hereditary cultivation right to $27\frac{10\frac{1}{2}}{16}$ Coolies of land yielding annually Rupees 64, which is stated to have been mortgaged by the Plaintiff's father about 10 years ago to Defendant's father for Rupees 40, in part liquidation of which, a sum of Rupees 15 had been made.

2. The Defendant admitted that the land had been granted to the Plaintiff's ancestors as village Curnums, but contends that the land lay waste, and that his father reclaimed and enjoyed the same paying Teerwah to the Plaintiff's grand-father and father, and that Plaintiff's uncle having appropriated a part of the above in 1841, an order was passed by the Collector restoring the land to the Defendant.

3. The District Moonsiff gave judgment in favor of the Plaintiff, but on Appeal this judgment was reversed by the Subordinate Judge on the ground that as the question of the Coodivarum right had been already disposed of by the Collector, whose decision had become final, the District Moonsiff had no right to interfere therewith.

4. In support of his application for the admission of the Special Appeal, the (Plaintiff) Special Appellant urges,

That the view of the case taken by the Subordinate Judge is at variance with the Circular Order of the Sudder Udalut of the 23rd April 1828, which ruled that a Collector's award of produce was no bar to the in-

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stitution of a Suit in regard to the proprietary right to the land, and that the Collector's award had reference merely to produce of the land on which the Petitioner held a mortgage lien.

5. The Court observe that the Collector's award of produce under Regulation V of 1822 presented no bar to the present Suit, wherein the title to the land is in issue. This question of title remains therefore to be pronounced on by the Subordinate Judge.

6. The Court of Sudder Udalut resolve therefore to remand the Suit in order that the Coodivarum right to the land in question may be decided.

No. 44 OF 1856.

DECREE DATED 13TH AUGUST, 1856. *Page* 101, *M. V.*

1. This Suit was instituted by Plaintiff to recover from the Defendant the sum of Rupees 173-3-0, principal and interest due on adjustment of accounts.

2. The Defendant admitted the correctness of the balance struck against him but pleaded that he made a part payment of Rs. 125 to one Govinda Chetty, Plaintiff's undivided cousin, with whom it had been usual to deal in all money transactions.

3. The Moonsiff decreed in favor of the Plaintiff's claim.

4. The Suit was remanded to the Moonsiff, in order that further investigation should be made with reference to the Defendant's plea of part-payment. In his revised Decree, the Moonsiff upheld his former judgment.

5. On Appeal the Acting Subordinate Judge reversed the Moonsiff's Decree, and dismissed the Suit, observing that Plaintiff and Govinda Chetty were shown to be undivided cousins, and the Plaintiff had adduced no proof to the contrary.

6. From this Decree, the Court of Sudder Udalut admitted a Special Appeal on the ground that the alleged payment to a third party, whose name is not entered in the document, and who was not in possession of it, cannot free the Defendant from liability.

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7. The Court of Sudder Udalut observe that the document sued on stands in the Plaintiff's name and its genuineness is admitted by the Defendant, who pleads payment of about 3-4ths of the amount to the Plaintiff's cousin (whose name is not entered in, and who was not in possession of, the deed at the time). No proof has been afforded that the payment to Govinda Chetty was either made with, or subsequently received, the Plaintiff's sanction; on the contrary it is stated by the Moonsiff and not denied by the Acting Subordinate Judge, that it has been proved that Govinda Chetty and the Plaintiff were on bad terms at the time of the alleged payment, and that the Defendant had offered payment subsequent to the date of the alleged payment to Govinda Chetty.

8. The Acting Subordinate Judge reversed the Moonsiff's decision on no other grounds than the fact of the Plaintiff and Govinda Chetty being undivided relations, but this fact is entirely foreign to the matter at issue in the present Suit which is, whether payment to a third party not in possession of the deed can be held to be valid if made without and contrary to the wishes of the party in whose name the bond stands.

9. The Court of Sudder Udalut consider that such third party's admission of payment cannot be held to be a bar to the bond-holder's demand and therefore reverse the Acting Subordinate Judge's decision with all costs.

No. 37 of 1856.

Decree dated 20th August, 1856. *Page* 103, *M. V.*

1. The Original Suit was instituted by the Plaintiff for the recovery of Rs. 46-14-0, principal and interest due on a bond.

2. The Moonsiff gave a Decree in favor of the Plaintiff, awarding to him the amount claimed with further interest due thereon.

3. In Appeal, the Principal Sudder Ameen reversed the decision of the Lower Court and dismissed the Plaintiff's claim with costs.

4. From this Decree, a Special Appeal was admitted by the Court of Sudder Udalut as it did not appear that the bond on which Plaintiff sued had been cancelled or discharged by a written acquittance.

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5. The Court of Sudder Udalut resolve to reverse the decision of the Principal Sudder Ameen, and to confirm that of the Moonsiff with all costs on the same grounds as those set forth in their decree in Special Appeal, No. 125 of 1825, viz. "that a written evidence of a debt cannot be set aside but on cancelment of the document or production of a written discharge. The Defendant having no such proof of release from the bond to produce, the Court of Sudder Udalut consider the bond to be valid against him."

No. 24 of 1856.

DECREE DATED 6TH SEPTEMBER, 1856. *Page* 128, *M. V.*

1. This Suit was instituted by the Plaintiff for the recovery of the Cist due on certain Enam lands, from the years 1848-49 up to the date of Plaint, at the rate of Rupees 16 per annum, with interest at 12 per cent thereon, and further for an injunction to the Defendants to continue paying the Cist at the above rate.

2. The Plaintiff declared the land to be Enam granted to his forefathers by the Nabob; that it was taken under the management of the grand-father of the 1st Defendant, who then promised to pay the Cist at the abovementioned rate; accordingly it was paid with all regularity to the Plaintiff and his family up to 1848, when the 1st Defendant, the then manager of the village, ceased payment.

3. The 1st Defendant denied that he was responsible to the Plaintiff for the Cist claimed, or that he held the Enam land claimed by Plaintiff as his. He stated that Plaintiff was to look to the ryots of the village for it; that though on some occasions he had been the medium of payment, yet that he was not liable for the same.

5. The Civil Judge decreed in favor of Plaintiff, considering that the evidence he bad adduced, oral and documentary, had established his claim, which he adjudged the 1st Defendant should satisfy with all costs.

6. From this Decree, the Defendant appealed to the Court of Sudder Udalut, reiterating his claim and impugning the credibility of the oral

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evidence as well as the genuineness of the documents on which the Judge relied.

7. The Court of Sudder Udalut are of opinion that the Civil Judge has failed to record the real points at issue in this case; and they accordingly resolve to remand the Suit with instructions to the Civil Judge to replace it on his file and pass judgment thereon de novo.

8. The Court of Sudder Udalut observe, that it cannot be determined from the record whether the annual sum claimed by this Plaintiff is the rent of the Enam land referred to, or an allowance payable from the collection of the Enam village; if the former, the Suit is not opposed to the provisions of Regulation IV of 1831, and Act XXXI of 1836, as it becomes one for debt, not for proprietary right; but if the latter, the enactments quoted would be a bar to its institution.

No. 66 of 1856.

Decree dated 17th September, 1856. *Page* 135, *M. V.*

1. The Suit was instituted by Plaintiff to recover from the Defendants a certain portion of ground as specified in the Plaint valued at Rs. 21, six trees valued at Rupees 4½, and Rupees 4, the value of a tree cut down by the Defendants.

2. The Plaintiff stated that the father of the 1st Defendant rented from him the ground sued for, and that on the death of his father the 1st Defendant received the lease.

3. The 1st Defendant declared he held the land of the 2nd Defendant.

4. The 2nd Defendant pleaded that the land sued for formed portion of a grant made to his ancestor by the Carnatic Rajah on the $\frac{\text{10th Arpasy Anunundah.}}{1674}$ This* grant he produced and stated that it had been filed and pronounced genuine in Original Suit, No. 959 of 1809, on the file of the late Auxiliary Court, and in Original Suit, No. 360 of 1849 before the Conad Moonsiff.

* Deed of Gift document I, Exhibit E.

5. The Moofty Sudder Ameen dismissed the Plaintiff's claim with costs.

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6. On Appeal, the Civil Judge reversed the Moofty Sudder Ameen's Decree discrediting the authenticity of the grant (Document I. Exhibit E.) on which the 2nd Defendant had based his claim to the land.

7. From this Decree, a Special Appeal was admitted by the Court of Sudder Udalut as it appeared that contradictory judgments had been given by different officers on the same evidence; exhibit E, having been admitted as a genuine document in one Decree and rejected in others and it was therefore necessary to pronounce upon the authenticity of Exhibit E.

8. The Court of Sudder Udalut are decidedly of opinion that the Sunnud Exhibit cannot be regarded as a gennuine and valid document. It is on plain Cadjan, bears no seal which it ought to do, and its appearance altogether belies the date it bears. Moreover it has not been registered in the Collector's Office as required by the provisions of Section XIX, Regulation XXXI of 1802, which declares, that Sunnuds not entered in the Registers shall not be deemed to be valid in any case whatever.

9. The Court of Sudder Udalut resolve therefore, to affirm the decision passed by the Civil Judge in Appeal Suit, No. 142 of 1854, and to dismiss this Appeal therefrom with all costs of Suit.

No. 69 of 1856.

Decree dated 15th October, 1856. *Page* 150, *M. V.*

1. The Suit was instituted by Plaintiff to recover from the Defendants $2\frac{4}{6}\frac{1}{4}$ Cawnies of Nunjah land which had been sold to her husband (deceased) by the 1st Defendant. This land Plaintiff stated had been leased to the husband of the 3rd Defendant and the latter retained possession thereof; hence this Suit.

2. The 3rd Defendant (the remainder having been declared exparte) declared that the land now claimed by the Plaintiff had been cultivated by her husband conjointly with the husband of the Plaintiff, and that the latter had upon verbal agreement sold the land to her (3rd Defendant's) husband and that consequently Plaintiff had no claim to it.

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3. The Moonsiff made an award in favor of the Plaintiff adjudging to her the land claimed as well as the grant of a Puttah for the same in her name.

4. On Appeal, this Decree was reversed by the Principal Sudder Ameen.

5. The Court of Sudder Udalut admitted a Special Appeal from this Decree in order to determine the validity of the verbal sale by the husband of the Plaintiff to the husband of the 3rd Defendant.

6. As the Plaintiff's right and title to the land was admitted by the 3rd Defendant, the Principal Sudder Ameen was evidently in error in questioning the Plaintiff's title. The only question was, whether the alleged sale of this land could be held to be valid in the absence of any writing in proof of the sale. The Court of Sudder Udalut have no hesitation in answering this question in the negative, as it would be opposed to the usage of the country and most dangerous in opening a wide door to fraud.

7. The Court of Sudder Udalut therefore resolve to reverse the decision of the Principal Sudder Ameen and confirm that of the Moonsiff with all costs.

No. 107 of 1856.

Decree dated 20th October, 1856. *Page* 156, *M. V.*

1. The Plaintiff sued to recover possession of 5 chains of Malgoozary Poonjah land yielding annually Rupees 40, and for arrears of Sawmybogum thereon amounting to Rupees 20.

2. The Plaintiff alleged that in 1845 her husband had leased the land in question to the 1st Defendant and the husband of the 2nd Defendant, who agreed to pay the Circar Teerwah due thereon, a Sawmybogum of 5 Cottahs of grain annually and to restore the land on demand; that since the death of the husbands of the Plaintiff and 2nd Defendant in 1851, the 1st and 2nd Defendants had paid the Teerwah direct instead of through the Plaintiff and have withheld the payment of Sawmybogum; and that these two Defendants in collusion with the 3rd to 5th Defendants have continued to cultivate and enjoy the land.

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3. The 1st, 3rd, 4th and 5th Defendants denied the truth of the Plaint and stated that on a division of the property after the death of the 1st Defendant's grandfather about 50 years ago, 2¾ chains of the land in dispute fell to the share of the 1st Defendant's father, and 2¼ to that of the Plaintiff's husband; that 1st Defendant's father and after his death, about 20 years ago, the 1st Defendant continued to enjoy this land and to pay Teerwah in the name of the Plaintiff's husband, as the registry stood unchanged in the name of the latter; that the Plaintiff's husband gave to the 2nd Defendant's husband the 2¼ chains which fell to his share which also the 2nd Defendant continued to enjoy since the death of her husband, and to pay the Teerwah.

4. The 2nd Defendant allowed the suit to be tried exparte.

5. The Moofty Sudder Ameen dismissed the Plaintiff's claim with costs, but his decision was reversed in Appeal by the Civil Judge as the Defendants were unable satisfactorily to account for the disputed land being entered in the name of the Plaintiff's husband for a period of 30 years.

6. The Court of Sudder Udalut observe that the Civil Judge's reasons for reversing the Lower Court's decision relate wholly to the Defendants not being able to account satisfactorily for the registration of the land being in the Plaintiff's husband's name, but the fact standing by itself would not in the opinion of the Court be sufficient for the reversal of the Lower Court's decision, inasmuch as the 1st Defendant and his father are stated to have had 30 years possession of the land in question.

7. The Court resolve therefore to admit the Special Appeal, and as no objection has been offered, they remand the suit for decision de novo on the merits.

No. 117 of 1856.

Decree dated 30th October, 1856. *Page* 161, *M. V.*

1. The Plaintiff sued to recover arrears of tax called "Thoppootty vary" amounting to Rupees 48-12-5 due to him as headman of the

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Saida caste under agreements executed to the Plaintiff's ancestors in 1805 and 1819, and for a declaration directing the Defendants to pay to him annually Rupees 9-12-1, at the rate of 1 fanam per Ryot, and to show him all marks of respect on occasions of ceremonies &c.

2. The Defendants 1 to 35 and 38 denied the Plaint, or of ever having paid the tax, or shown the respect claimed by the Plaintiff, that the 38th Defendant is the head of the caste of 50 villages, and that the appointment of headman is optional with the caste people.

3. Eight objectors claimed the right to the headman-ship of the caste of the 50 villages as belonging to the 1st objector.

4. The District Moonsiff dismissed the Plaintiff's claim, and his decision was confirmed in Appeal by the Acting Civil Judge, who was of opinion that the matters in dispute were not adjudicable by the Courts.

5. On the application of the Plaintiff, the Court of Sudder Udalut resolved to admit a Special Appeal with the view of remanding the Suit in order that it may be disposed of on its merits, as they observed that Suits of this description are under the Regulation cognizable by the Civil Courts.

6. A notice having been issued to the Special Respondents and no objection having been raised, the Court of Sudder Udalut resolve to remand the Suit for judgment de novo with reference to the foregoing observation.

No. 70 of 1855.

DECREE DATED 12TH NOVEMBER, 1856. *Page* 173, *M. V.*

1. The Suit was instituted to recover from the Defendants the sum of Rupees 2,000, principal and equal interest due on a deed of simple mortgage given on the 23rd September 1839 by Oppoyee, alias Janakee Ummal (mother and guardian of the late minor Zemindar of Odiarpolliam) to the Plaintiff, of whom the money was borrowed on the mortgage of two villages obtained by the said Janakee Ummal of the Arialore Zemindar. Janakee Ummal and her son, the late minor Zemindar of Odiarpolliam, died without liquidating the amount of the Bond, and the Plaintiff sued the 1st Defendant both as heir of Janakee Ummal and as successor to the Zemindary of Odiarpolliam, and the 2nd Defendant,

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the Arialore Zemindar, as being in possession of the two villages mortgaged as security for the money borrowed.

2. The Principal Sudder Ameen dismissed the Plaintiff's claim with costs, holding that though the mortgage deed on which the Plaintiff sued was genuine, yet he (Plaintiff) had failed to prove the 1st Defendant's liability as heir to Janakee Ummal; and in regard to the 2nd Defendant, that the Plaintiff had been unable to show that Janakee Ummal had such interest in the 2 villages now in the possession of the 2nd Defendant as justified her in mortgaging them.

3. On Appeal this Decree was confirmed by the Civil Judge.

4. A Special Appeal was admitted by the Court of Sudder Udalut from these judgments as it appeared to them that there were questions involved in the Suit which had not been determined by the Decree of the Civil Judge. The allegation of the Plaintiff was that the property mortgaged had been given to Janakee Ummal on her marriage and that as such she could deal with it at pleasure, whereas the Decree of the Civil Judge would seem to treat the property as forming part of the general estate of the minor, whereas this has not been made to appear according to the statements of the parties to the Suit.

5. Both the lower Courts held that the Plaintiff had entirely failed to prove the 1st Defendant's liability for the debt contracted by the late Janakee Ummal, assigning good reasons for considering that the 1st Defendant was not liable. The Special Appellant has tacitly admitted his inability to adduce any legal objection to this portion of the Civil Judge's Decree.

6. The questions at issue as regards the 2nd Defendant are, whether the late Zemindar of Areyalore, (the uncle of the late Janakee Ummal and brother of the 2nd Defendant) in December 1828 gave his niece (the late Janakee Ummal) two villages in the Areyalore Zemindary in Dowry; (the Plaintiff's document B, the Dower deed mentions that the *beriz* of the 2 villages was given and not the *villages* themselves as the Plaintiff appears to consider) and if so, whether this transfer is of legal force and effect as regards the present Zemindar, the 2nd Defendant, so that the said property can be held liable for the mortgage thereon passed by the late Janakee Ummal to the Plaintiff.

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7. Neither of the Lower Courts have pronounced any opinion as to the genuineness of the Dower deed, but have held that no proof whatever has been afforded that Janakee Ummal had the legal right to mortgage the villages. The documents filed by the Plaintiff in Appeal and to which the Civil Judge refuses to attach any weight, afford no proof whatever of this right, whatever they may do as to the grant of the Dower deed and Janakee Ummal's engagement under it.

8. The Plaintiff's admission that the 2 villages are part of the Areyalore Zemindary raises the strongest presumtion that the alleged transfer could not have been regularly registered at the office of the Collector, and the public assessment fixed on the separated portions, because if this had been done, the villages and their beriz should have ceased to form any portion of the Areyalore Zemindary. And as the transfer was not made according to the restrictions prescribed in Regulation XXV of 1802, that law declares that it shall be of no legal force or effect. The clear and obvious intent of the Regulation was to defeat improper alienations to the prejudice of the rights of Government or of the successor (2nd Defendant) to the estate, both of which would in the present instance be injured if the beriz of these two villages was alienated from the Zemindary, whilst the Zemindary continued responsible to Government for the same amount of Peishcush as when including these villages.

9. The Plaintiff was called on, in the 4th point, to prove that Janakee Ummal had the right to pledge the two villages ; now, part of this proof necessarily was that the transfer was legal under Regulation XXV of 1802 ; but the Lower Court observed that " the Plaintiff has offered no proof whatever of Janakee Ummal having had such an interest in them as justified" the mortgage, and the documents filed in appeal are useless as to this point.

10. Under these circumstances, the Court of Sudder Udalut consider that the alienation of the beriz of the two villages by document B is not binding on the 2nd Defendant, and resolve to dismiss the Special Appeal and confirm the Civil Judge's Decree with all costs.

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No. 49 of 1856.

Decree dated 21st November, 1856. *Page* 165, *M. V.*

1. The Suit was instituted by the Plaintiffs as hereditary Meerassee Stanikals and Curnums of the Teroo Ootra Gasamungay Davustanum situated within the Ramnad Zemindary, for the recovery from the Defendants of Rupees 14,957-4-6 losses incurred by the frauds and embezzlements and misappropriation of monies (belonging to the Pagoda) committed by them, as also for their dismissal from office as Trustees of the said Pagoda, and further for a decision upon the proprietary right in the Pagoda claimed by the 1st Defendant as Zemindar of Ramnad.

2. The Defendants deny the acts of fraud, embezzlement and misappropriation alleged against them and plead that the proprietary right, to the Pagoda is vested in the Zemindar, the Trustee.

3. The Acting Civil Judge decided that the 1st Defendant had no proprietary right in the Pagoda in question, but dismissed the claim of the Plaintiffs for the recovery of the above sum of Rupees 14,957-4-6, and rejected their request for the dismissal of the Defendants from their situations as Trustees.

4. From this Decree Appeals were preferred by both the Plaintiffs and Defendants, the latter praying the Court of Sudder Udalut to reverse the Decree of the Civil Judge so far as affected the decision which declared the proprietary right to the Pagoda not to vest in the 1st Defendant, and the former that the claim of the Plaintiffs for the recovery of Rupees 14,957-4-6 should be satisfied by Defendants and that the 1st Defendant should be removed from the trust she had been proved to have mismanaged and abused.

5. The Court of Sudder Udalut observe that the position of the Plaintiffs and 1st Defendant as proved by the pleadings and the oral admission of the respective parties Vakeels (corroborated by somewhat questionable evidence produced by both parties) is as follows.

6. The 1st Defendant is Zemindar of Ramnad (a territory consisting of about 1,300 square miles), and according to the general rules and the known usages of the country is, in virtue of her position, Superintendent,

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Manager and Trustee of the various Pagodas situated within her Zemindary. The 1st Defendant does not claim any *private* proprietary right in these Pagodas, and admits that she can neither sell, alienate or dilapidate the Devasem property, as the proprietary right to these Pagodas is vested in the whole Hindoo Community; but she maintains that she, as Manager and Trustee, stands as representative of the community, and as such is the only person who can sue or be sued respecting the Pagoda property, or can issue the necessary orders, &c. for managing the same. The 1st Defendant fully admits that her authority is not uncontrolled, inasmuch as she is responsible under Regulation VII of 1817 to the Board of Revenue, the legally constituted supervising authority, who may, on cause shown, examine into complaints of misappropriation, &c.

7. The Plaintiffs are *some* of the Stanikal and other servants attached to this Pagoda of Teroo Ootra Gasamungay Davustanum. They are under the orders of the Durmakurter (1st Defendant), and though their situations may be hereditary, yet they are liable to dismissal by the Durmakurter for serious misconduct. The Plaintiffs being members of the Hindoo community and ministerial servants in the Pagoda, have clearly such an interest therein as would authorize their bringing any misappropriation of the funds, &c. of this Pagoda to the notice of the Tribunals duly constituted for investigating the same.

8. The questions in issue in Appeal are—I. Has the Civil Court any jurisdiction in the case? II. Is the acting Civil Judge correct in declaring that the Plaintiffs are in full possession of all the rights of this Temple and in any way lessening the powers and authority hitherto exercised by the 1st Defendant as explained at para. 2? III. Since the Plaintiffs' charges against the 1st Defendant have been dismissed, is not the 1st Defendant entitled to her costs?

9. The Court of Sudder Udalut observe that the Legislature has, by Regulation VII of 1817 vested the Board of Revenue with the general superintendence of all endowments in land or money granted for the support of Hindoo Temples, &c. and declared that the Board of Revenue shall take measures for the due appropriation of such endowments &c. by the Trustees, Managers or Superintendents. As Regulation VII of 1817 has not been repealed or modified by any subsequent enactment, it is

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clear that the Plaintiffs should have brought their complaints before the Board of Revenue, and that the Courts have no authority to interfere, inasmuch as the present Suit not being for the recovery of the Plaintiffs' rights or for damages for any loss or injury unduly sustained by them, is not included under Section XIV. Regulation VII of 1817, which prescribes what Devustanum Suits are sustainable in the regular course of law.

10. The Acting Civil Judge appears to have confused the absolute and irresponsible private proprietary right to a Pagoda (which the 1st Defendant does not claim and Suits for which like those for any other private property are within the jurisdiction of the Courts) with that proprietary right to public property which is vested in the Trustees and for the due exercise of which the Trustee is responsible to the duly constituted controlling authority (which limited proprietary right the 1st Defendant does claim in virtue of her Trusteeship).

11. The Plaintiffs have not preferred any claim to or proved the right to the possession of all the rights of the Temple; consequently, the Civil Judge erred in decreeing the same to them and the reason assigned by the Civil Judge for this opinion at paras 15,16 and 17, are incomprehensible. It is evident that no paid servants of a charity liable to dismissal by the Trustee for misconduct could be declared possessed of all the rights of the institution to the prejudice of the Manager or Trustee in whom these rights are vested in Trust—this would be placing the servant who is *under* the Trustee and liable to dismissal by the Trustee, *above* his immediate superior, the Trustee.

12. The Civil Judge dismissed the Plaintiffs' claim to recover the amount of the alleged misappropriation; the Sudder Udalut consider that these have not been proved, but are of opinion that dismissal of these claims should have been accompanied by awarding the Trustee (1st Defendant) the costs incurred by defending the present action.

13. The Plaintiffs' Suit is therefore dismissed with *Original* and Appeal costs.

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No. 139 of 1856.

Decree dated 24th November, 1856. *Page* 188, *M. V.*

1. Plaintiff sued to recover Rupees 149, as damages for the indignity he had suffered at the hands of the Defendants, and also to establish his right to certain distinctions and privileges at a particular festival.

2. The District Moonsiff gave judgment in favor of the Plaintiff for 70 Rupees damages, and pronounced him entitled to the privileges claimed.

3. In Appeal the Principal Sudder Ameen reversed the Moonsiff's decision.

4. The Court of Sudder Udalut finding that there were grounds for the admission of a Special Appeal, directed that notice should issue to the Special Respondent to shew cause why the Suit should not be remanded. The notice has been duly served, but no objection raised by the Special Respondent.

5. The Court of Sudder Udalut find that the Decrees of both the Lower Courts are defective. That of the Moonsiff consists of a summary of the evidence given by each witness, and a concluding paragraph stating that "for these reasons" he found for the Plaintiff. This is opposed to Section 48 of the Rules of Civil Procedure. The Decree of the Principal Sudder Ameen is defective inasmuch as each party claims the garland as being a hereditary honor, and he has not given a distinct award on this point. The Principal Sudder Ameen is also in error in declaring that damages are not recoverable in a case in which a party has been unjustly deprived of honor.

6. On the foregoing grounds the Court of Sudder Udalut resolve to admit a Special Appeal and to remand the Suit to the Moonsiff for judgment de novo.

No. 129 of 1856.

Decree dated 10th December, 1856. *Page* 202, *M. V.*

1. Plaintiff sued to recover the sum of Rupees 112-8-0 with interest, advanced to Defendant, to enable him to institute certain Suits in the Courts.

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2. The Defendant denied that he was indebted to the Plaintiff and declared the plaint-bond a forgery.

3. The District Moonsiff's judgment in Plaintiff's favor was reversed by the Civil Judge on the ground that the contract was objectionable, and ought not to be enforced.

4. A Special Appeal was admitted by the Sudder Udalut with the view of determining whether the Civil Judge was correct in applying the English Law as to maintenance of Suits to this case, which was between Hindoos.

5. The Special Respondent answers that the principle on which the English Law in this particular is based is recognized in the Civil Courts, as is shown by the endorsement on the Vakalutnamahs of all Pleaders.

6. It is stated in the Decree of the Civil Judge that the Plaintiff's brother-in-law a Vakeel of the Court, was present when the bond was executed, and that immediately afterwards a Vakalutnamah was executed to him by the Defendant. The Defendant promised in the bond to repay to the Plaintiff the sum borrowed, with interest, from the amount to be awarded to him in the Suits he was about to bring. This amount would naturally be paid by the Court to the above Vakeel, and it may be presumed he would arrange so as to pay to the Plaintiff the amount due to him. The Court further observe that the Bond contains a clause by which the Defendant engages in the event of his being about to institute other Suits, that he will deliver over the documents connected with them also to the Plaintiff, and borrow further sums of money for the expenses of the Suits. It appears clear to the Court that the object of the Plaintiff in this transaction was to further the interests of his brother-in-law, the Vakeel; and they consider this union between a money-lender and a Pleader of the Court, to aid suitors, to be extremely objectionable. They consider this, therefore, to be a case in which the English Law, as regards "maintenance," can with great propriety be applied, and they accordingly resolve to dismiss this Special Appeal, and confirm the Decree of the Lower Court with all costs.

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No. 95 of 1856.

Decree dated 17th December, 1856. *Page* 205, *M. V.*

1. The Suit was instituted to procure the release from attachment of a house valued at Rs 350 which had been advertized for sale in execution of a Decree in an alleged collusive Suit instituted by the 1st Defendant against the 2nd and 3rd. The Planitiffs urged that the house in question was the property of the Tarwaad and as such could not be made liable for the private debt of the 2nd and 3rd Defendants; they also questioned the competency of the 2nd Defendant, who was blind, to bind the whole family by his acts.

2. To this the Defendants replied that the house was not the property of the Tarwaad but belonged exclusively to the 2nd and 3rd Defendants, that the 2nd Defendant, the Karnaven of the family, though blind for the last 20 years trades, and that the debt in question was contracted on this account and consequently the litigated and if necessary other family property is liable for the same.

3. The Moonsiff held that the house was family property; that the debt had not been incurred on account of the family and that the 2nd Defendant was from blindness incapacitated from binding the Tarwaad by his acts. He accordingly decreed in favor of the Plaintiffs, assessing the 2nd and 3rd Defendants with all costs.

4. This Decree was on Appeal reversed by the Principal Sudder Ameen.

5. From this latter Decree a Special Appeal was admitted by the Court of Sudder Udalut with a view of determining whether the admission of a deed signed by the eldest male member of a family who has been blind for the last 20 years without the signature of an Ananthraven in proof that the debt was contracted for the benefit of the family, is not contrary to the usage of Malabar.

6. The Court of Sudder Udalut observe that, it is not alleged that the judgment debt in question was incurred for the benefit of the family and that the 1st to 3rd Defendant's statements are to the effect that the said Paramba is the 2nd and 3rd Defendants' private property, distinct

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and separate from their family property and consequently liable for the 2nd and 3rd Defendants' private debts. The question therefore is, whether the property belonged to the Tarwaad. If it did, it cannot be rendered liable for the debt contracted by the 2nd Defendant (even if the latter be admitted to be the manager of the family), because the family property is not liable for a debt contracted by the head of the family for his own use. But the Principal Sudder Ameen has founded his decision mainly on the ground that even if the property be Tarwaad, it would be liable because the debt was contracted by the Karnaven (2nd Defendant), and he passed no clear decision on the real question at issue, viz. does the property belong to the Tarwaad.

7. The Court of Sudder Udalut therefore resolve to remand the Suit for a clear decision, whether this is the 2nd and 3rd Defendants' private property, distinct and separate from that of the family or the reverse. The onus probandi rests on the 1st to 3rd Defendants, and not on the Plaintiffs (i. e. the family generally.)

No. 121 of 1856.

Decree dated 17th December, 1856. *Page* 207, *M. V.*

1. The Plaintiff sued to recover from the Defendant the sum of Rs. 110-13-6, being principal and interest with postage charges, and for further interest on a bill of exchange endorsed to him (Plaintiff) by Defendant on 1st March 1853 for Rupees 110-0-0.

2. The Plaintiff stated that the bill in question was drawn by Mr. Mackenzie in favor of Mr. Cross on Messrs. Binny & Co. Mr. Cross endorsed the bill to the Defendant who in turn endorsed it to Plaintiff who paid Mr. Cross the amount thereof. The Plaintiff then transferred the bill to one Ramasawmy Chetty by whom it was presented for payment to Messrs. Binny & Co. and by them dishonored. Plaintiff having repaid Ramasawmy Chetty has brought this action against Defendant for the amount.

3. The Defendant admits having endorsed the bill sued on, but pleaded no consideration.

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4. The Moonsiff gave judgment in favor of Plaintiff.

5. This decision was on Appeal reversed by the Acting Subordinate Judge, who doubted the Plaintiff's statement that he had paid Ramasawmy Chetty the amount.

6. From this Decree a Special Appeal was admitted by the Court of Sudder Udalut, on the ground that the Acting Subordinate Judge had assigned no valid reasons for absolving the endorser of a bill of exchange from the responsibility of his endorsement.

7. The Court of Sudder Udalut observe that the only question at issue is, whether the Defendant's plea that his endorsement had been granted as a convenience to others can free him from the responsibility attaching thereto.

8. The Court of Sudder Udalut have no hesitation in reversing the Acting Subordinate Judge's decision and confirming that of the Moonsiff, on the ground that the Defendant's endorsement being admitted, the Acting Subordinate Judge erred in freeing the Defendant, a merchant, from the consequences of his own deliberate acts on mere vague surmises not affecting the real question at issue.

9. The plea now raised by the Defendant in the Special Appeal, viz. that he was discharged from all liability as prompt notice of the dishonor of the bill was not given him, not having been raised before the Lower Courts, cannot now be taken into consideration.

No. 131 of 1856.

Decree dated 17th December, 1856. *Page 208, M. V.*

1. The Suit was instituted for the recovery of Rupees 522-5-4, being principal and interest due on a document executed by the Defendant on the 19th November 1849, whereby he promised to pay the Plaintiff Rs. 500 in ready money with interest in the event of his (Defendant's) failing to deliver within six months a Paramba, or his own Komangate Paramba, in exchange for the Plaintiff's Jenm Paramba made over to Defendant.

2. The Defendant traversed the Plaintiff's claim urging that he (Plaintiff) had only a claim of 275 fanams on his Jenm Peramba, and that the

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sum of Rupees 500 was only entered in the bond as a penal condition and that it could not equitably be enforced.

3. The Moofty Sudder Ameen decreed that the Defendant should make over to the Plaintiff the Komanjad Paramba with interest on fanams 275 up to the date of Decree or in default to pay the sum of Rupess 500 without interest, together with 1-4th of the fees of Plaintiff's Vakeels and all costs.

4. On Appeal, the Acting Civil Judge modified the above Decree adjudging the Defendant to pay Plaintiff Rupees 500 with interest up to date of payment with all costs save the fees of Plaintiff's Vakeel.

5. From this Decree, a Special Appeal was admitted by the Court of Sudder Udalut, on the ground that it was requisite in equity to take into consideration the propriety of enforcing the penalty incurred by the Defendant on failure of performing the conditions of his agreement, the said penalty amounting to about five times the amount of the claim of the Plaintiff.

6. It is a general principle in equity that whenever a penalty is inserted in a bond merely to secure performance or engagement of a collateral object, the latter is considered as the principal intent of the instrument and the penalty is deemed only as accessory and therefore intended only to secure the due performance of the instrument.

7. The Moofty Sudder Ameen in his Decree adjudged the Defendant to deliver over to the Plaintiff the Komangad Paramba as stipulated in the bond, or on failure thereof, that he should pay the penalty; this appears to the Court of Sudder Udalut an equitable judgment. But in failure of the Defendant to deliver over the above garden within two months, the Plaintiff, in the opinion of the Court of Sudder Udalut, is entitled to recover interest on the 500 Rs. penalty as stipulated in the bond, from the date on which it became leviable.

8. The Court of Sudder Udalut resolve therefore to reverse the Decree of the Acting Civil Judge and to confirm that of the Moofty Sudder Ameen with the above modification as regards interest.

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No. 97 of 1856.

Decree dated 24th December, 1856. *Page* 213, *M. V.*

1. This Suit was brought by Plaintiff as adopted son of one Seenevassiengar to recover from the Defendant's property in lands, &c. of the value of Rupees 680, exclusive of the income derivable therefrom as set forth in detail in the plaint.

4. The Principal Sudder Ameen considering the adoption of the Plaintiff by Seenevassiengar, whose brother-in-law he was, invalid, declared a nonsuit against him.

5. From this Decree Plaintiff appealed to the Civil Judge, maintaining the validity of his adoption and his right to succeed to the estate of his adoptive father and the latter's nephew Vencataputty Iyengar who were members of an undivided family.

6. The Civil Judge having referred the question of Hindoo Law regarding the adoption to the Pundits of the Court of Sudder Udalut, received two opinions as to its validity; the Senior Pundit pronouncing the adoption valid, the Junior Pundit giving a contrary opinion: attaching however more weight to the opinion of the senior than to that of the junior Pundit and on full consideration of the evidence adduced in the case, the Civil Judge decided in favor of the Plaintiff's claim, reversing the Decree of the Principal Sudder Ameen, subject to the payment by Plaintiff of Rupees 52-8-0, due on a mortgage deed dated 5th April 1836. Both parties were decreed to bear their respective costs.

7. From this Decree the Court of Sudder Udalut admitted a Special Appeal, with a view of considering the correctness of the Civil Judge's opinion on the question of Hindoo Law respecting which contrary opinions had been given by their Pundits.

8. The Court of Sudder Udalut observe that the Defendant's pleader has failed to show that the person adopted stood within the prohibited degrees to his adoptive father, nor does Sir Thomas Strange, in his exposition of the Hindoo Law, determine the adoption of a brother-in-law to be invalid. The Court of Sudder Udalut are of opinion, that as no legal bar existed to the marriage between the adopter and his adopted

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son's mother in her maiden state, the adoption of a brother-in-law is not opposed to the principles of Hindoo Law.

9. On the above grounds, the Court of Sudder Udalut resolve to confirm the Appeal decision, and to dismiss this Special Appeal with costs.

1857.

No. 124 of 1856.

Decree dated 8th January, 1857. *Page 1, M. V.*

1. The Suit was instituted by Plaintiff to recover from the Defendants certain lands sold to him for Rupees 65-0-0 under a bill of sale, dated 17th April 1852, executed by the 1st, and attested by the 2nd Defendant.

2. The 1st Defendant admitted the Plaintiff's claim.

3. The 2nd Defendant declared that the 1st Defendant had no right or title to the land, that she was dependant upon the 2nd Defendant for maintenance and had no right to dispose of the property in question.

4. The Moonsiff decreed in favor of the Plaintiff, and this Decree was in Appeal confirmed by the Principal Sudder Ameen.

5. A Special Appeal was admitted by the Court of Sudder Udalut from these Decrees of the Lower Courts, on the grounds that the 1st Defendant, the widow of the last male owner of the land, is, under Hindoo Law, but little more than tenant for life and trustee for the ulterior heirs, and cannot alienate immoveable property, but with the consent of the chief heir, except from necessity to discharge her late husband's debt, which necessity has not been shown to have existed in the present instance.

6. The Court of Sudder Udalut having put the following question to the Pundits of their Court :—

"B and X are brothers and jointly held property—B and X die and are succeeded in the property by X's son C—C dies and there are no

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male issues in the family—C's widow D succeeds, but B leaves a widow A, a daughter, and a grandson by his daughter. Has D a right to all the family property without the concurrence of A and her daughter and grandson?" and received this answer.

"It being laid down in Treatises on the Hindoo Law such as Vignaneswaryam, that the estate of a man dying without male issue or undivided cousins *(Dayadis)* descends to his widow, the female D referred to in the question inherited the whole of the property of C. But as A is entitled to receive maintenance from D out of the said property, D has no power whatever to sell the whole estate during A's lifetime. D can, however, sell a small portion of it for the purpose of discharging the debts of her husband or for the benefit of his soul or for her own subsistence in a season of scarcity. To this the consent of A or of her daughter or grandson is unnecessary," find the Plaintiff's claim (under a deed of sale from the Defendant D to which the 2nd Defendant A is found not to have consented) to be opposed to the Hindoo Law, and accordingly in reversing the Appeal Decision and dismissing the Plaintiff's Suit, assess the Plaintiff (Special Respondent) with all costs.

No. 3 of 1857.

Decree dated 15th January, 1857. *Page* 2, *M. V.*

1. Plaintiff sued to recover the balance of a certain loan, after deducting the payments made by the Defendant. The Defendant was exparte.

2. The Kauzee gave judgment for the Defendant, on the grounds that the parol evidence for the Plaintiff did not prove what amount remained due to him, and that his accounts were insufficient uncorroborated by other evidence.

3. In Appeal, the Officiating Agent reversed the Kauzee's decision giving judgment in the following terms: "the Officiating Agent having considered the purport of the Appeal Petition, and perused the original proceedings before the Lower Court, reverses its Decree, on the grounds that Defendant not defending the Suit, there was no reason to doubt the

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accounts produced by Plaintiff, which accounts determined the amount which the witnesses though unable to define they had proved, the existence of such evidence was sufficient."

4. Finding that there were reasons for remanding the Suit to the Lower Court, a notice was served on the Special Respondent to shew cause against such remand : but no objections have been raised.

5. The Court of Sudder Udalut observe that the Respondent does not appear to have been served with any notice to file an Appeal answer, which course was requisite before the Original Decision in his favor could be reversed. The Court also observe that the circumstances of Defendant, Respondent, having been exparte in the Original Suit was a fact under the Kauzee's consideration, and does not in itself establish the truth of the Plaintiff's claim. The question in Appeal was, whether the evidence adduced was sufficient to prove the Plaintiff's allegation. The Kauzee considered that it did not establish his cause, assigning reasons for holding this opinion, whilst the Officiating Agent has assigned no satisfactory grounds for holding a contrary opinion.

6. The Court of Sudder Udalut therefore resolve to admit this application for a Special Appeal and to remand the Suit to the Officiating Agent for the reception of the Respondent's answer, and in order that the parties may be confronted and examined and fresh evidence taken if tendered ; and judgment passed de novo.

No. 133 of 1856.

Decree dated 22nd January, 1857. *Page 5, M. V.*

8. This Suit was brought by 32 inhabitants of a village to obtain the cancelment of a Rajee Decree entered into by the 1st four Defendants, wardens of a certain Pagoda in the village, and the 6th and 7th Defendants, who were in occupation of certain lands belonging to it. The Plaintiffs constitute about one-fifth only of the inhabitants of the village, they allege that the said Rajee Decree was fraudulent and invalid, inasmuch as by it, it was agreed that the 6th and 7th Defendants should pay a less rent for the Pagoda Lands than had been previously paid and

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than the 6th and 20th Plaintiffs were willing to pay. They prayed therefore that the lands might be transferred to the 1st and 20th Plaintiffs by whom this enhanced and proper rent would be paid. The Plaintiffs do not allege that they have individually received any private loss or damage. They aver that the lands belong to the Pagoda and they have come forward as members of the village community to obtain redress of the wrong committed by the wardens who had been appointed by Government.

9. Had there been no specific enactment of the legislature regarding the general superintendence of all endowments in land granted for Hindoo temples, the Court would have considered the Plaintiffs had a right of action, inasmuch as they have, as members of the village community, an interest in the village temple. But by Regulation VII of 1817, the Board of Revenue is vested with the general superintendence of endowments of land for Hindoo temples. The wardens to whom the charge of the lands has been committed were appointed by the Board of Revenue and their Agent the Collector. So long as the above Regulation remains unrepealed, the Board of Revenue is bound to act in conformity with its provisions. If the wardens have been guilty of any misconduct and any fraud has been practised by them in the matter of the Pagoda Lands, redress must be sought for by the Plaintiffs from the Board of Revenue, and they are bound to grant it.

10. Had any of the Plaintiffs received a private injury at the hands of the Pagoda wardens, an action would lie in the Civil Courts under Section XIV of the above Regulation. But the Court is of opinion that so long as Regulation VII of 1817 remains unrepealed, it is not competent to the Plaintiffs to bring an action in the Civil Courts against the wardens for malversation in the matter of the temple lands. The Court is of opinion that the Civil Courts have no jurisdiction in such a case.

No. 141 of 1856.

Decree dated 28th January, 1857. *Page* 18, *M. V.*

1. This Suit was instituted by Plaintiffs for the recovery of ground valued at Rupees 50, with the trees standing thereon valued at Rupees

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194-4-0 belonging in common to Plaintiffs who were the Meerassidars of the village.

2. The Defendants denied the Plaintiffs' title to the ground.

3. The Moofty Sudder Ameen being of opinion that the Plaintiffs failed to establish their right to the ground in dispute, dismissed their claim with costs.

4. This Decree was on appeal reversed by the Civil Judge, who considered that the evidence produced by Plaintiffs fully supported their claim.

5. The Court of Sudder Udalut admitted a Special Appeal in this case on the grounds of the Suit being irregular, inasmuch as it was instituted against several individuals with distinct interests, each having a holding of his own, and these should have been proceeded against by separate actions (Vide Decree of the Court of Sudder Udalut in Special Appeal No. 143 of 1855.)

6. The Court of Sudder Udalut resolve to reverse the Decree passed by the Civil Judge in Appeal on the ground upon which they admitted the application for a Special Appeal; viz. that the Suit was irregularly brought, it having been instituted by the Plaintiffs against several individuals, each having a holding of his own, and consequently having separate and distinct interests, which rendered it necessary that they should have been proceeded against in separate actions, for the portion of ground, &c. occupied by each.

Nos. 22 and 23 of 1857.

Decree dated 5th March, 1857. *Page* 45, *M. V.*

1. These were actions to recover damages consequent on the failure of Defendants to deliver certain quantities of raw indigo in accordance with two agreements executed by their ancestors; and also to recover certain sums acknowledged in the same agreements to be due on adjustment of accounts.

2. The District Moonsiff found that the heirs of the parties who had signed the documents (Gurwappa and Iyennah) had not inherited any

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property from them; and that the ancestors of the Defendants were not shown to have been undivided members of the same family; and on these grounds the Moonsiff dismissed the suits.

3. The Civil Judge in appeal reversed the Moonsiff's decision and held the Defendants responsible for the Plaintiff's claim.

4. From these decrees Defendants prefer a special appeal on the grounds that the Moonsiff having decided that they had inherited no property from their ancestors, they cannot legally be held answerable for their debts and liabilities; and that it has been ruled that the Courts cannot enforce the penal conditions of documents.

5. The Court of Sudder Udalut resolve to admit a special appeal in this matter and to remand the suits for decision de novo, on the following grounds. It has been repeatedly ruled by the Sudder Udalut that an inheritance clearly implies a beneficial interest in the property of a deceased party; not a responsibility for debts which the assets of the deceased cannot cover.

"The mere taking possession of an estate by the next heir of a deceased party, is for the benefit of all parties, and cannot in justice entail an obligation passing beyond the value of the estate."

6. Before therefore any of the Defendants can be held wholly or in part answerable for the deceased relative's debts under documents granted by them, it must be proved that they inherited property; but in the present case the Civil Judge has altogether failed to meet the Moonsiff's finding that they inherited no property, or to shew clearly what property they inherited and the value of it. The land which was transferred by the 1st Defendant in suit No. 528 might have been transferred in satisfaction of a judgment debt, in connection with suit No. 272 of 1842, in which a decree was given against her husband; so that the 1st Defendant's transfer might have been made with no other view than to free herself from responsibility for the said decree. Moreover, if one or all of the Defendants are eventually found liable, it is questionable whether the full penalty demanded under the plaint bonds can be equitably enforced.

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No. 29 OF 1857.

DECREE DATED 16TH MARCH, 1857. *Page* 53, *M. V.*

1. This was an action of ejectment, as Defendants, the Tenants, refused to give up the land which Plaintiff alleged his father had inherited from his adoptive father.

2. The 1st Defendant traversed the plaint by denying the alleged adoption; and pleaded that he was no tenant, but a co-proprietor with the Plaintiff.

3. The Moofty Sudder Ameen's decision in Plaintiff's favor was reversed by the Civil Judge in these terms.

"The Court does not concur in the view taken of this case by the lower Court.

"The Appellant's plea that he has right to the land in question in common with the Respondent, is fully borne out by the evidence produced, as well as by the fact of his being the Doyadee or cousin of the Respondent, who has failed to produce documentary proof of his father's adoption by Valoyda Othundan.

"The Court therefore reverses the original decree and adjudges the Respondents to pay all costs."

5. The Court of Sudder Udalut observe that the Civil Judge has failed to state how the Defendant had joint right with the Plaintiff, or explain the nature of the alleged joint right, or to assign any reasons for crediting evidence that was discredited by the Moofty Sudder Ameen. The Sudder Udalut would also remark that the absence of documentary evidence does not warrant the rejection of the plea of adoption, if it had been established by trustworthy testimony.

6. The extreme brevity of the Civil Judge's judgment precludes the Court of Sudder Udalut from ascertaining whether the case has received due consideration. In order that a clear opinion may be recorded on the above points, the Court resolve to admit a Special Appeal, and to remand the suit to the Civil Judge for decision de novo.

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No. 35 OF 1857.

DECREE DATED 19TH MARCH, 1857. *Page* 64, *M. V.*

1. The Original Suit was instituted for the recovery from the Defendants as heirs of the deceased Cauttan Ambalagaren, Cavilgar of the Plaintiff's Village, 23 Cullums of paddy stolen from his field, or the value thereof, Rupees 35-15.

2. The 1st Defendant alleged that when her husband, the deceased Cauttan Ambalagaren was ill, the Plaintiff lodged a complaint of the robbery before the Police Officers, who, after enquiry, gave judgment that no robbery had taken place, and the 2nd, 3rd and 4th Defendants pleaded their non-liability, as they had separated 30 years ago and inherited no property from the deceased Cauttan Ambalagaren.

3. The District Moonsiff of Conaud dismissed the Plaintiff's claim as he considered the robbery not to have been proved, and on appeal this decision was confirmed by the Principal Sudder Ameen who observed that the Plaintiff's claim was untenable under Section XV, Reg. XI of 1816.

5. The Court of Sudder Udalut observe that Section XV, Reg. XI of 1816, declares that village watchers shall not make good losses by theft, but this is evidently not intended to prohibit the inhabitants and Cavilgars making any private arrangement respecting losses by theft; in the present case it is alleged that the 1st Defendant's husband had agreed to make good the loss if the robbery actually took place, and the Principal Sudder Ameen should therefore have pronounced whether the Moonsiff was correct in freeing the 1st Defendant from all responsibility on the grounds that it was clear that no robbery had taken place.

6. The Court of Sudder Udalut resolve therefore to remand the suit to the Principal Sudder Ameen for the above reasons.

No. 36 OF 1857.

DECREE DATED 23RD MARCH, 1857. *Page* 65, *M. V.*

5. The Court of Sudder Udalut observe that the usual notice was not served upon the Respondents to file an answer to the appeal, which

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course is required by law to be followed before a decision can be reversed (vide Circular Instructions of the Sudder Udalut, dated 2nd December 1846.)

No. 145 of 1856.

Decree dated 25th March, 1857. *Page 67, M. V.*

1. This Suit was instituted for the recovery of $1\frac{1}{16}$ Cawny of Poonjah land, yielding annually Rs. 10-4-10, with the indigo crop standing thereon, valued at 30 Rs., and for Rs. 4, costs incurred in applying to the Court for the release of the said property, which had been attached in execution of the decree in suit No. 158 of 1847, passed in favor of this 5th Defendant.

2. The Plaintiff stated that the land was sold to him in consideration of Rs. 115 which he had lent to the 1st Defendant, to be paid on account of the 2nd Defendant to the 5th Defendant, Plaintiff in original suit No. 158 of 1847, on the file of the Principal Sudder Ameen's Court. Plaintiff further stated that the deed of sale for the land was attested by the 2nd, 3rd, 4th and 5th Defendants.

4. The 5th Defendant traversed the Plaintiff's claim, stating that the $1\frac{1}{2}$ Cawny of the land in question had, in December 1839, been mortgaged to him by the 2nd Defendant, and that on his instituting original suit No. 158 of 1847 the amount was adjudged to be recovered from the said land, which was attached in satisfaction of the decree.

5. The District Moonsiff decreed that the 5th Defendant had made good his title to the $1\frac{1}{2}$ Cawny of the land; he therefore awarded to the Plaintiff $\frac{3}{16}$th Cawny only of the amount claimed by him, further adjudging the Plaintiff to pay the 5th Defendant's Costs.

6. On Appeal the Principal Sudder Ameen reversed this decree, adjudging to Plaintiff the land sued for by him.

7. From this decree the Court of Sudder Udalut admitted a Special Appeal on the ground that the decree of the Principal Sudder Ameen was opposed to the Circular Order Sudder Udalut No. 48, which required that any private settlement of a decree should be brought to the notice of the Court passing the decree.

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8. The Plaintiff admitted in his Plaint that he was aware that the 5th Defendant held a lien on 1½ Cawny of this land under the decision in Original Suit No. 158 of 1847, as well as that on the date of the alleged liquidation of this decree (which took place on his alleged purchase of the estate) he took no document from the decree-holder permitting the Judgment debtor's sale of this 1½ Cawny of land, and that the alleged liquidation of the 5th Defendant's (the Judgment creditor) lien had never been by the 5th Defendant or any other party brought to the notice of the Court. The Court of Sudder Udalut therefore consider that the Principal Sudder Ameen was in error in reversing the Moonsiff's decision and upholding the alleged private adjustment of a decree, which settlement had never been brought to the notice of the Court passing the said decision in Original Suit, No. 158 of 1847, any such judgment as that passed by the Principal Sudder Ameen in this subsequent suit is in direct contravention of the Circular Order Sudder Udalut, No. 48 of the 15th August 1837, the object of which was to enforce the immediate execution of decrees already passed without reference to the obstruction and delays that might be sought to be thrown in the way of execution by alleged private adjustments or by the institution of subsequent suits (Vide Proceedings of Court of Sudder Udalut 6th January 1847 and decree of the Court of Sudder Udalut in No. 32 of 1852) for the recovery of a sum of money alleged to have been paid towards the execution of a decree.

9. The Court of Sudder Udalut therefore resolve to reverse the Principal Sudder Ameen's decree and confirm that of the District Moonsiff, with all costs.

No. 149 of 1856.

Decree dated 25th March, 1857. *Page 69, M. V.*

1. The Plaintiff sought to recover from the Defendants her share of the family property, left by two undivided brothers, of whom she and the 1st Defendant were the widows. The amount claimed by the Plaintiff was Rupees 61-8.

2. The Defendants denied the Plaintiff's claim to any share of the family property, which they declared had been on the departure of the hus-

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bands, Havildars, to Rangoon, registered in the name of the 1st Defendant's son ; that further the two brothers, the husbands of the Plaintiff and 1st Defendant, died in 1850 in Moulmein, and the 1st Plaintiff was in receipt of Rupees 5-4 as a pension ; and that this being sufficient for her maintenance, she was entitled to no more from the family estate.

3. The Moonsiff non-suited the Plaintiff on the grounds that the amount of property not being correctly specified he was unable to make an award in her favor.

4. On Appeal and on consideration of some further evidence not available in the original trial, the Subordinate Judge reversed the Moonsiff's decision, awarding to the Plaintiff the amount claimed.

5. From this decree a Special Appeal was admitted by the Court of Sudder Udalut, as in undivided Hindoo families the whole of the property would devolve on the undivided brother's son, whilst the Plaintiff (the widow of the other deceased brother) would be entitled only to maintenance, which is afforded her by the pension of Rupees 5¼ a month.

6. The husbands of the Plaintiff and 1st Defendant in this case being undivided brothers of a Hindoo family and having both died, the one childless the other leaving a son, the whole property left by them devolves under Hindoo law on the said undivided brother's son. The Plaintiff, widow of the other deceased brother, being only entitled to maintenance, which is afforded by the pension of Rupees 5¼ which she draws from Government, no other provision is necessary.

7. The Court of Sudder Udalut resolve therefore to reverse the decree of the Subordinate Judge, and confirm that of the District Moonsiff. The Plaintiff (Special Respondent) to pay all costs.

No. 108 of 1856.

DECREE DATED 16TH APRIL, 1857. *Page* 80, *M. V.*

1. Plaintiffs sued to recover half the value of a certain house, and to establish an exclusive right to perform poojah in certain pagodas, in virtue of promises made to the 2nd Plaintiff by his own father, confirmed

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by a verbal declaration made by his brother, the 2nd Defendant's husband, at the time of his death.

2. The 1st Defendant pleaded that the 2nd Plaintiff had lost all right of inheritance on his adoption out of the family, and denied the allegation respecting the promises made to him, adding that a division of the family property had taken place. The 2nd Defendant denied the division alleged by the 1st Defendant, and pleaded that there being no surviving male heirs, she had sole right to the property.

3. The Moonsiff adjudged to Plaintiff the right of performing poojah as sued for, but rejected his claim to a share of the family property. In appeal the original decision was reversed.

4. A Special Appeal was admitted by the Sudder Udalut, because the Subordinate Judge had founded his judgment in appeal on the supposition that the 2nd Plaintiff was adopted into another family, whereas it was contended by the Special Appellant that he was adopted into the same family, by his own father's undivided brother's son, and that he was heir at law and only male heir to the family property. The Special Respondents have not appeared.

The Special Appellant, who was 2nd Plaintiff in the original suit, did not appeal from the Moonsiff's decision which, though rejecting his claim to any of the family property, affirmed his right to the situation in the pagoda. The only question before the Court, therefore, is whether he, by being adopted by his cousin, has lost all claim to succeed in this situation, as the only surviving male relative in the family. The Hindoo law as applicable to this case, is set forth in the following opinion given by the Pundits of this Court. "*Question.*" A, a Goorookul of a pagoda, had three sons B, C, and D, the youngest of whom, D, was adopted by A's divided paternal uncle's son, the late X. B, and C, died, leaving widows E. and H. The male heirs in A's family being extinct, would D, if nearest male relation, have the right to a Goorookul situation in a pagoda, in preference to the widows E. and H ?

"*Answer.*" The duties of a Goorookul of a pagoda consist in the performance of the rites of consecration, worship, festival, &c. These rites, says the Augama Saster, should be performed by the descendants of the same person who had first celebrated them, with reference to the particular Augama by which they were originally regulated ; the per-

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formance thereof being attended with the recital of Vytheka Mantras, or hymns of Vedas.

According to this rule, D who has been adopted by A's divided paternal uncle's son, and who must in consequence be considered A's Dayadi, (Kinsman) and a sharer in the pagoda in which A was a Goorookul is entitled to succeed A in the Office of Goorookul, in preference to the widows E. and H, the fact of his adoption not having destroyed his consanguinity to A, although it rendered him no longer allied to A by funeral oblations. The maintenance of the said widows, however, being a charge upon the income of the Office in question, D is bound to afford them maintenance, in proportion to the emoluments derivable from the said Office of Goorookul.

The Court of Sudder Udalut therefore resolve to reverse the Subordinate Judge's decree, and confirm that of the Moonsiff with costs, as the latter Officer's opinion is fully borne out by that of the Law Officers of the Court.

No. 48 OF 1857.

DECREE DATED 23RD APRIL, 1857. *Page* 86, *M. V.*

5. The Court of Sudder Udalut notice, that the Acting Civil Judge is in error in declaring, * * * that if the Plaintiffs have recourse to the Courts in lieu of a suit under Regulation V of 1822, they must do so with the understanding that they must be prepared to defray all costs incurred, &c. The legislature has prescribed no such penalty or prohibition on the institution of Suits of this description before the Courts. Sections XXXVI and XL, Regulation XXVIII of 1802, and other regulations, on the contrary, contemplates as a general principle that a Court which may give a decree for the arrears of rent or Revenue due to proprietors or farmers shall award the full costs incurred (vide also Special Appeal Sudder Udalut, No. 1 of 1849, page 136).

No. 5 OF 1857.

DECREE DATED 29TH APRIL, 1857. *Page* 92, *M. V.*

1. This Suit was brought for a share of family property. The Plaint set forth that the Plaintiff's father had been in 1786-7 given in adoption

to one Tonjammal of Maliumputty, at which time the family were undivided; subsequent to this adoption the Plaintiff's grandfather and great uncle having died, the Plaintiff's paternal uncles (fathers of the 1st and 2nd, 4th and 6th Defendants) followed their brother (Plaintiff's father) to Maliumputty; here they all lived as an undivided family, enjoying in common the property Plaintiff's father had acquired by adoption, as well as their own ancestral property situate in Mailcooppam.

2. In 1827-8 the 3rd Defendant, cousin of Plaintiff's father, and others of the family quarrelled, when the whole property, both ancestral as well as that acquired by Plaintiff's father on his adoption, was divided into 3 shares to be distributed as follows: one to the Plaintiff's father, one to his uncles (fathers of 1st and 2nd, 4th and 6th Defendants), and one to the 3rd Defendant; the lands were not however divided, but the produce was distributed as above and a farikat or deed of division executed; but this arrangement was only carried out as regarded the 3rd Defendant.

3. After the death of Plaintiff's father, further disagreements having taken place, the Plaintiff applied to the 1st, 2nd, 3rd, 4th and 6th Defendants for his share of the property, and on their refusal to deliver the same to him has brought this action for the recovery thereof, valuing it at Rupees 4,163.

4. The Defendants denied the Plaintiff's claim; they maintained that the whole property was divided in 1827-8 into two shares, of which one was given to the 3rd Defendant and the remaining share to the fathers of Plaintiff, 1st, 2nd, 4th and 6th Defendants; that in 1847 the Plaintiff having sought to obtain his share, the property was divided into 4 shares, the amount of Plaintiff's share was Rupees 1,378-2-0, but that when the deed of division was prepared the Plaintiff refused to sign it.

5. The Subordinate Judge was of opinion that the Plaintiff had proved his title to the share of the family property as claimed under the document sued on; the value of this the Subordinate Judge, having received what he considered to be trustworthy evidence, pronounced to be Rupees 2,896, for which and for the costs of Suit he gave a decree in Plaintiff's favor.

6. On Appeal this decision was confirmed by the Acting Civil Judge.

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7. From these decrees of the Lower Courts a Special Appeal was admitted by the Court of Sudder Udalut in order to determine whether the judgments had been in accordance with the law.

8. The Court of Sudder Udalut reverse the decree of the Subordinate Judge (confirmed by the Acting Civil Judge) in this case.

9. The Plaintiff seeks for a division of the family property according to the terms of a deed executed in 1828. The provisions of Clause 4th, Section XVIII, Regulation II of 1802, preclude the Courts from dealing with this document. Under the deed in question no division of the family property as regards the Plaintiff's father had been effected; consequently all the parties connected with this deed, and who have not acted upon it, are still to be viewed according to Hindoo Law as members of an undivided family, as the mere execution of the deed did not alter the condition of the family.

10. That the above is the Hindoo Law of the case has been decided by this Court in Appeal Suit No. 86 of 1854.*

Nos. 14 and 15 of 1857.

Decree dated 29th April, 1857. *Page* 94, *M. V.*

1. The Original Suit was instituted by Plaintiffs for a declaration of their right to inherit the property of the 1st, 2nd, 3rd and 6th Defendants, widows of their deceased co-parceners, and for an award declaratory of the said widow's right to a life interest only in the income derivable from the property.

2. The 1st, 2nd, 4th, 5th, 6th, 7th and 9th Defendants were declared *exparte*. The 3rd Defendant pleaded that the Plaintiffs belonged to a branch of the family long since divided, and that she had, previous to her husband's death, obtained his consent to adopt a son, and that, subsequent to her husband's decease, she had adopted her younger brother, the 5th Defendant.

3. The 8th Defendant supported the 3rd Defendant's defence.

4. The Moonsiff was of opinion that the adoption set up by the 3rd Defendant was valid in Law, and in accordance with local usage; he therefore dismissed the Plaintiffs' claim.

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5. On Appeal this decision was reversed by the Assistant Judge, who considered that the adoption of a wife's brother was invalid, and that on the demise of the 1st, 2nd, 3rd and 6th Defendants, the Plaintiffs had the right to inherit their property.

6. From this decree Special Appeals were admitted (that of the Special Appellant in Special Appeal Suit No. 15, in order to obtain a declaration of her daughter's right to inherit the share of Special Appellant's property) on the grounds that the Assistant Judge had misconstrued the Hindoo Law, first in erroneously applying it to the status in which the adopted son's mother stood to the adopter* (3rd Defendant's husband) after the adopter's marriage with the adopted son's sister (3rd Defendant) instead of applying the Law to the position of the adopted son's mother in her maiden state; and secondly in omitting to notice that even if the adoption were to be rejected the daughter of the 1st Defendant (Special Appellant in Special Appeal Suit No. 15) has a preferable claim to that of the more distant divided male relatives.

* i. e. adoption made by his authority given during his life time.

7. The 5th Defendant's (4th Respondent) adoption has been found by both the Lower Courts; the question at issue therefore is, whether the Assistant Judge is correct in considering that a Soodra in the Southern parts of the Presidency cannot adopt his wife's brother. The grounds assigned by the Assistant Judge (Para 16) for his opinion are the passage in Strange's Hindoo Law, Vol. I, page 71, "that one with whose mother the adopter could not legally have married must not be adopted." Consequently he argues that the same principle which prohibits the adoption of a brother because the adopter cannot marry his own mother, would forbid the adoption of a brother-in-law, because the adopter is prohibited from espousing his wife's mother. But if the Assistant Judge had read a little further he would have found that Sir Thomas Strange states that the son of a brother of the whole blood is the most proper object of adoption; thus clearly indicating that the prohibition refers to such blood relationship between the adopter and the adopted son's mother as would have prohibited marriage with the latter in her maiden state; were it otherwise it would forbid the adoption of a brother's son on the grounds that a man could not marry his sister-in-law, although the nephew (son of a brother) is universally admitted to be the most

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proper object of adoption. The above construction of the Law is also supported by paras. 96-97 of Strange's Manual, and is in accordance with that given by the District Moonsiff and Senior Pundit.

8. The rejection of the Plaintiffs' claim to be the nearest heirs (to the exclusion of the 5th Defendant) renders it unnecessary to go into the claim of the 1st Defendant's daughter.

9. The Assistant Judge's decision is therefore reversed, and that of the Moonsiff confirmed, with all costs, original and appeal.

No. 53 OF 1856.

DECREE DATED 29TH APRIL, 1857. *Page* 96, *M. V.*

12. The signature of the writers of letters * * * must be proved, before these documents can be admitted in evidence.

13. The Originals of documents (copies of which may be put in evidence) must be produced and proved.

14. The deaths of the individuals (copies of whose depositions are filed as * * *) must be proved, before the depositions can be admitted in evidence.

No. 2 OF 1857.

DECREE DATED 1ST JULY, 1857. *Page* 108, *M. V.*

1. The Suit was instituted by Plaintiffs to establish their exclusive right to a well which they maintained had been built by their ancestors.

5. The Moofty Sudder Ameen deeming the Plaintiffs to have established their rights to the well in issue, passed a decree in their favor.

6. On Appeal this Decree was reversed by the Civil Judge, who was at a loss to understand how the Moofty Sudder Ameen entertained a second time the same action; but even supposing the suit to be sustainable he was of opinion that the Plaintiffs had failed to prove their right to the well to the exclusion of the Defendants.

10. The Civil Judge (the Court of Sudder Udalut remark in disposing of the Special Appeal) assigns no other reason for reversing the Moofty's decision on its merits than that the "Plaintiffs have failed to

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prove their right to the well to the exclusion of the Defendants" who have established their right to the well by their Documents; but on being called on to explain the nature of the evidence on which he has come to this conclusion, states that it was based upon the evidence of the Curnum, Cavilgar and others before the Tahsildar. As the reception of copies of the depositions of parties given without oath who might have been cited before the Court is contrary to a well known principle of evidence, the Court of Sudder Udalut resolve to reverse the Civil Judge's decision and confirm that of the lower Court with all costs.

No. 8 of 1857.

Decree dated 1st July, 1857. *Page* 110, *M. V.*

1. The Suit was instituted by the Plaintiff as guardian of M. Vencataramanumma (a minor), widow of one Madhevapti Raghotham Row, for the recovery from the Defendants of Rupees 100 with interest due on a bond executed by the husband of the 2nd Defendant, who, with the 1st, 3rd and 4th Defendants, lived as members of an undivided family.

5. The Moofty Sudder Ameen decreed in favor of Plaintiff as against the 2nd, 3rd and 4th Defendants; but considering that the 1st Defendant had not been proved to have been living with the 2nd, 3rd and 4th Defendants as a member of an undivided family, and also that the plea raised by the 5th Defendant in bar against his liability had been sustained, dismissed the Plaintiff's Suit as against them.

6. From this latter portion of the Decree the Appellant, ward of the Plaintiff in Original Suit, having attained her majority, appealed to the Civil Judge, who reversed so much of the Moofty Sudder Ameen's decree as exonerated the 1st Defendant from all liability, but confirmed it in other respects.

7. A Special Appeal petition having been presented to the Court of Sudder Udalut by the 1st Defendant, this Special Appeal was admitted in order to determine whether the 1st Defendant, who was brother of the 2nd Defendant, the widow of the granter of the bond, could be held personally liable for a debt due by 2nd Defendant's deceased husband to the husband of the Plaintiff's ward.

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8. The Court of Sudder Udalut observe that the fact of the 1st Defendant being brother-in-law of the deceased debtor, residing in the same house with and aiding his sister in the management of her deceased husband's property, affords no legal grounds for making him (1st Defendant) responsible for a debt due under a bond passed by his deceased brother-in-law. The Court of Sudder Udalut therefore consider that the Civil Judge erred in modifying the Lower Court's decision by holding the 1st Defendant responsible for the amount of the bond. This portion therefore of the Civil Judge's decision is reversed with costs.

No. 4 of 1857.

Decree dated 8th July, 1857. *Page* 120, *M. V.*

1. This was a suit for the division of the family property of the contending parties.

2. The 1st Defendant pleaded that the proportions claimed were not just and equitable. The 2nd Defendant contended that according to the usages of the family, its common property could not be subjected to division.

3. The Principal Sudder Ameen awarded a share of the ancestral estate to the Plaintiffs, though not the proportion they claimed.

4. In appeal the original decision was confirmed.

5. A Special Appeal was admitted on the ground that it was questionable whether, under the Maroomakatayam Rules, the division of family property can be enforced, if opposed by other members of the family.

6. The Court of Sudder Udalut, being of opinion that the decision appealed from is contrary to the usages in force as respects the rules observed under the Maroomakatayam law of inheritance, resolve to reverse the decree in question. The point in issue has been decided by a Judgment of the Sudder Udalut, passed so far back as the year 1811, and the Court now fail to discover any grounds for questioning the correctness of the conclusion arrived at in that award.

7. The Court of Sudder Udalut are further of opinion that the enjoyment of the Malikana allowance in the shares admitted, cannot be viewed as a consent to the division of the property as now sought, nor

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can it be accepted by the Court as a ground on which it would be justified in upholding the decrees of the Lower Courts. The Special Respondents will bear all the costs.

No. 32 of 1857.

Decree dated 15th July, 1857. *Page* 128, *M. V.*

1. This Suit was instituted to recover from the Defendants an excess of rent declared due for an alleged excess of land in their enjoyment above what was set forth in the Original Puttah.

2. The Defendants denied the Plaintiff's claim to any excess of rent.

3. The Moonsiff was of opinion that the Plaintiff had failed to establish his claim to the excess of rent; on this point, therefore, he declared him to be non-suited, but adjudged to him the payment by Defendants of the arrears of rent at the rate laid down in their document B; he further decreed that they should pay all interest of the amount claimed with all costs.

4. On Appeal the Civil Judge confirmed the decree of the Moonsiff in so far as he non-suited the Plaintiff in regard to the claim for excess of rent, but reversed that portion of the decree which made the Defendants answerable for interest and all costs of Suit.

5. From this decree a Special Appeal was admitted on the grounds 1st that it was questionable whether the Acting Civil Judge was correct in considering that any party who prefers the institution of a regular Suit for his claim instead of laying the same before the Collector under Regulation V of 1822 should, whatever may be the issue, be taxed with all the costs of the regular Suit; and 2ndly, that since the Acting Civil Judge by confirming the Moonsiff's decision held that the Appellant had no ground for appealing, it was manifestly erroneous to saddle the Respondent with the costs of that portion of the Appeal which was found to be groundless.

6. The opinion expressed by the Acting Civil Judge in respect to the liabilities of parties for costs who proceed by Civil action instead of under Regulation V of 1822 cannot be upheld. The provisions of that Regulation do not interfere with the jurisdiction of the Civil Courts, and every

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case disposed of by them must be dealt with on its merits in respect to costs as well as the matter at issue in the Suit.

7. The award of the Acting Civil Judge in regard to the costs awarded to be paid by Special Appellant on that portion of the Appeal pronounced groundless is reversed. Costs to be paid by Special Respondents in accordance with the sum adjudged in this Special Appeal.

No. 54 of 1857.

Decree dated 22nd July, 1857. *Page* 140, *M. V.*

1. The Suit was instituted by Plaintiff for an injunction to the Defendants to close the door of a privy opening into a lane leading to Plaintiff's house, to remove another door, and also that the exclusive enjoyment of the lane in question should be conferred on him, Plaintiff.

2. The Moonsiff decreed that the Defendants should close the door of the privy opening into the lane, but dismissed the Suit brought by Plaintiff in regard to the two last portions of his Plaint, holding that the lane had been proved to be a thoroughfare.

3. Cross Appeals having been preferred from this decision, the Principal Sudder Ameen modified the decree of the Moonsiff, dismissing the claim of the Plaintiff in toto, being of opinion that as the Moonsiff had pronounced the lane to be common property, he had erred in adjudging the Defendants to remove the door of the privy on the ground of its being a public nuisance, the removal of such nuisances being placed in the hands of the Magistracy under Act XXI of 1841, and that the Courts were prohibited from interfering in matters cognizable by them.

4. From this decree the Court of Sudder Udalut admitted a Special Appeal, in order to determine whether the Principal Sudder Ameen had not erred in dismissing Plaintiff's Suit as barred by Act XXI of 1841.

5. The Court of Sudder Udalut having examined the record of this case, are of opinion that the Principal Sudder Ameen's reversal of the District Moonsiff's decision and dismissal of the Plaintiff's claim to have the door in dispute opening into the lane in question shut up by the Defendants, on the grounds set forth in his decree (vide above, para. 3) cannot be upheld.

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6. The Court of Sudder Udalut observe that Act XXI of 1841 authorises a Magistrate when the Public right and comfort are in question to cause unlawful obstruction and nuisances to be removed from thoroughfares and public places, but the Principal Sudder Ameen is in error in supposing that the above act prohibits the Courts from having jurisdiction over or limits their jurisdiction in regard to Suits respecting private injuries arising from obstruction, &c. in thoroughfares. The Principal Sudder Ameen's decision is therefore reversed, and that of the Moonsiff confirmed with all costs.

Nos. 58, 59 and 60 of 1857.

Decree dated 12th August, 1857. *Page* 145, *M. V.*

The Court of Sudder Udalut observe that the present Suit appears to be one of those contemplated by Section IX, Regulation V of 1822. It appears to be admitted that the Plaintiff (the Zemindar) received no rent subsequent to 1827; that no puttah or moochilka was interchanged: and that on his attempting to levy his demands by distraint in 1842, the collector forbad the same as he rejected his claim as illegal.

The Plaintiff mainly bases his claim on his statement that the carar filed in Suit No. 29 of 1852 dispensed with the necessity for the grant of puttah, but the Sudder Udalut observe that he has failed to file the said carar, and that both the lower Courts viewed the carar as *requiring the use of puttahs and moochilkas.*

The Moonsiff stated that the Plaintiff says "so much of the present "claim as was due in 1852 was not included in Suit No. 29, because "the arrears claimed in that Suit were due under a deed, whilst the pre-"sent claim rests solely on the verbal promises of the Defendants;" and he adds in another part of his decision that one of the stipulations of the carar (dated 1839) mentioned that a document was to be granted by the Zemindar after obtaining a chit, but it is admitted that neither of these stipulations were carried out, though the Collector's order of 1842 rendered the issue of puttahs and moochilkas indispensably requisite, and for these reasons dismisses the Suit under Section IX, Regulation V of 1822.

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The Principal Sudder Ameen admits, at para. 9, that it is true the moochilka ought to have been taken under Section IX, Regulation V of 1822, (in that the Moonsiff's decision was legally correct) but urges that the enforcement of the provisions of that regulation is calculated to cause loss to the Zemindar and therefore (setting aside the law) awards the Plaintiff the amount of his demand for tax (that is not barred by the limitation law) as, for reasons shewn, he considers the tax claimed justly due.

The Court of Sudder Udalut are of opinion that as the Principal Sudder Ameen admitted that the Moonsiff had correctly applied the law to this case, he was in error in allowing his private opinion respecting the consequences of the working of Section IX, Regulation V of 1822, to set aside that law, and they therefore resolve to reverse the Principal Sudder Ameen's decision and confirm those of the Moonsiff, with all costs.

No. 43 of 1857.

Decree dated 23rd August, 1857. *Page* 154, *M. V.*

Plaintiff sued to recover from the Defendant* certain sums, partly as compensation for loss of interest and premium, occasioned by the acts of the Defendant, and partly as a refund of money which the Defendant had illegally levied from him in the shape of a fine.

The Defendant pleaded that the Plaintiff was amenable to his jurisdiction under Regulation IX of 1822, was being obliged to perform any duties, whether revenue or magisterial, that might be imposed upon him, though the designation of his office was "magistrate's peshkar;" and further that having acted in good faith under the conviction that he, Defendant, had jurisdiction, he was entitled to the protection afforded by Act No. XVIII of 1850.

The Civil Judge gave judgment for the Defendant, and dismissed the Suit.

From this decision Plaintiff Appeals, urging that Regulation IX of 1822 was enacted exclusively for the punishment of malversation in revenue affairs; and that if Act No. XVIII of 1850, were applicable to the present case, property seized by a public officer acting in good faith, need never be returned, although in fact he had no jurisdiction.

* Collector of Masulipatam.

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The Sudder Udalut are of opinion that Regulation IX of 1822 relates solely to cases of malversation in revenue affairs, and that it has been erroneously applied to the case now under consideration, where the Plaintiff was a police officer charged with bribery "in a magisterial case." As Rupees 50 of the fine of Rupees 250 is admitted to have been returned since the institution of the Suit, the Court of Sudder Udalut Decree that the Defendant shall repay to the Plaintiff the sum of Rs. 200, (if that amount has not already been returned to him as is alleged by the Defendant's Vakeel), and pay all costs original and appeal for the amount allowed, viz. 250 Rupees, together with interest on the same amount, at 12 per cent. per annum, from the date of the institution of the Suit to that of the sums being repaid to the Plaintiff.

No. 70 of 1857.

DECREE DATED 26TH AUGUST, 1857. *Page* 156, *M. V.*

The Plaintiffs sued to recover a house and ground, alleged to have been sold by the first Defendant to one Chedumbara Chetty, the father of the first, and grand-father of the second Plaintiff; and transferred by him in gift to the first Plaintiff.

The Defendants pleaded that the Chedumbara Chetty, to whom the first Defendant had sold the property, was not the person named by the Plaintiffs, but the 2nd Defendant's late husband.

The District Moonsiff dismissed the claim as unfounded; and in Appeal the Principal Sudder Ameen also dismissed the Suit, on the ground that it was barred by the law of limitation.

A summary Appeal having been preferred to the Civil Judge that officer recorded his opinion that the claim was actionable, and directed the Principal Sudder Ameen to replace the Suit on his file, and dispose of it on its merits.

After such investigation the Principal Sudder Ameen passed a decree, reversing that of the Lower Court, and adjudging the Defendants to deliver over to the Plaintiff the property claimed.

The Court of Sudder Udalut admitted a Special Appeal in order to rectify an error into which the Civil Judge had fallen in directing the Prin-

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cipal Sudder Ameen to pass a decision on the merits, after he had dismissed the Appeal on the ground that the action was barred by the Statute of limitation; while the decision of the Principal Sudder Ameen could only be affected by a Special Appeal to the Sudder Udalut.

The Special Respondent urges that the Special Appellant cannot now benefit by the error of the Civil Judge; and that the Principal Sudder Ameen's first decree, not having been passed upon the merits, should only be regarded as a diary order.

The proceedings of the Civil Judge, remanding the Suit to the Principal Sudder Ameen for decision de novo, were clearly illegal; the revised Appeal decree passed in conformity thereto must therefore be set aside: and as the Court of Sudder Udalut see no reason to interfere with the first decree passed by the Principal Sudder Ameen, confirming that of the District Moonsiff, which was passed on a full investigation of the merits, they resolve to affirm the same, and adjudge the Special Respondent to pay all the costs of Suit.

No. 37 of 1857.

Decree dated 29th August, 1857. *Page* 161, *M. V.*

The Plaintiffs sued in virtue of their office as second Teerta Meerassidars of the Trivullore pagoda, to recover from the Defendants (the first of whom was the Dhurmakurta) property to the aggregate value of Rupees 5,000, which they had appropriated to their own use.

The Civil Judge, being of opinion that the Plaintiffs had failed to shew that they were authorized by their position to sue the Defendants, non-suited the Plaintiffs.

With the permission of the Judges, the first Plaintiff has preferred an appeal in formâ-pauperis, wherein he urges that every person interested in the management of a common fund has a right of action against the trustees; that in the present instance the Plaintiffs are admitted to possess certain special privileges in connection with the pagoda, which give them more than an ordinary interest in its management.

The pauper Plaintiff (Appellant) does not allege that he has received any private injury from the Dhurmakurta, but sues on account of the

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Defendants' alleged malversation in conducting the affairs of the pagoda of which the first Defendant is Dhurmakurta. The Sudder Udalut observe that it has been already decided by the Sudder Udalut decrees* in Appeal Suit No. 49 and Special Appeal Suit No. 133 of 1856 that the Courts of Udalut have no jurisdiction over Suits of this description; and they therefore dismiss the Appeal, thereby confirming the Civil Judge's decision, with all costs.

No. 109 of 1857.

Decree dated 7th September, 1857. *Page* 165, *M. V.*

Plaintiff instituted this Suit to establish his right to a certain wall near his house.

The first Defendant contended that the wall in question belonged to him.

The Moonsiff's decree in Plaintiff's favor was confirmed by the Acting Subordinate Judge on the sole ground that the first Defendant had been invited to make oath on the subject, and had objected to do so.

The Court of Sudder Udalut resolve to remand the Suit to the Appellate Court for a decision on its merits; the refusal to make oath being no legal ground for pronouncing a judgment against a party so refusing to swear.

No. 98 of 1857.

Decree dated 16th September, 1857. *Page* 169, *M. V.*

Plaintiff sued to recover the third share of the amount agreed to by the parties in Suit No. 102 of 1831, to be paid by the present Plaintiff, his son, and the ancestor of the present Defendants to the Plaintiff in that Suit; the Defendants' ancestors share having been advanced by the Plaintiff.

The District Moonsiff considered the claim barred by the law of limitation, and therefore dismissed the Suit.

In Appeal the Principal Sudder Ameen was of opinion that Plaintiff's claim had been kept alive by the circumstance of his having brought a

* Pages 258 and 270.

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Suit for it in 1848. After investigation of the merits, the Principal Sudder Ameen awarded to Plaintiff the amount sued for.

A Special Appeal was admitted, as it appeared questionable whether the bare institution of a Suit, afterwards withdrawn, without the production of any document to show that it had been withdrawn in consequence of promises of payment made by the Defendant, could prevent the operation of the Statute of limitations.

The Plaintiff's statement shews that this claim originated in 1836 and it is therefore barred by the limitation law as decided by the Moonsiff, without the Plaintiff can shew, by clear and positive proof, that the Defendant promised to pay, or can assign satisfactory reasons why he did not proceed with the Suit, viz. Original Suit No. 61 of 1848, formerly instituted by him respecting the above claim. The allegation respecting the Defendant's promises is a bare uncorroborated assertion of the Plaintiff, whilst his admission that he voluntarily withdrew Suit No. 61 of 1848 in hopes of settling the matter amicably, proves his failure to assign any satisfactory cause for neglecting to proceed with that case. The mere institution of a civil action that is subsequently withdrawn, does not give a fresh starting point with regard to the limitation law, as supposed by the Principal Sudder Ameen.

The Principal Sudder Ameen's decision is therefore reversed, and that of the Moonsiff confirmed with all costs.

No. 126 of 1857.

Decree dated 1st October, 1857. *Page* 179, *M. V.*

The Original Suit before the Moofty Sudder Ameen, was brought by Plaintiff to recover damages on account of the defamation of his character by Defendant.

The Defendant put in no answer, and the Sudder Ameen decreed in favor of Plaintiff.

Defendant appealed against this decision to the Civil Court, urging that the case had been decided against him exparte, without allowing him sufficient time to put in his answer.

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The Civil Judge considering that this default on the part of Defendant (Appellant) had not been satisfactorily explained, refused to enter into the merits of the case and dismissed Defendant's Appeal.

A Special Appeal against this decision was preferred and admitted, on the grounds that the Civil Judge was in error in refusing to enter into the merits of the case, because Appellant (Defendant) had not pleaded in the lower Court.

It has been ruled that the defaulting party may appeal against an exparte decision, and that judgment must be passed by the higher Court on a consideration of the record as it stands.

The Court of Sudder Udalut accordingly remand this Suit for the decision of the Civil Judge on the merits of the case.

No. 128 of 1857.

Decree dated 5th October, 1857. *Page* 181, *M. V.*

Plaintiff brought this Suit to recover certain lands, or their value, his share of ancestral property.

The District Moonsiff dismissed Plaintiff's Suit as barred by the Statute of limitations.

On Appeal the Principal Sudder Ameen overruled the Moonsiff's decision on this point, and disposing of the case on its merits, decreed in favor of Plaintiff.

A Special Appeal against this decision was preferred by Defendant, and admitted, on the ground, that the Principal Sudder Ameen having ruled, that the Suit was not barred by the Statute of limitations, should not have decreed on its merits himself, but should have remanded it to the lower Court.

As the Moonsiff dismissed this Suit, as barred by the law of limitations, the Principal Sudder Ameen, who considered it was not so barred, should have remanded the case for disposal on its merits, and the Court of Sudder Udalut now remand it for this reason.

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No. 61 of 1857.

Decree dated 21st October, 1857. *Page* 188, *M. V.*

The object of this action was to obtain possession of a certain Mootah, which Plaintiff had purchased at a public sale.

The first Defendant answered, that finding Plaintiff had fraudulently withheld the balance, for which the estate had been put up to sale, and which had been entrusted to Plaintiff for delivery to the revenue authorities, he had brought the circumstance to the notice of the Board of Revenue, and obtained their permission to cancel the sale.

The Principal Sudder Ameen discredited the evidence adduced to prove the alleged fraud, and accordingly decreed for Plaintiff. The Civil Judge viewing the evidence in question as satisfactory, dismissed the Suit.

A Special Appeal was admitted, as it appeared to be questionable whether, the sale being legally made, Plaintiff was not entitled to obtain possession, the party defrauded being left to his own remedy by an action for damages or for the cancellation of the sale.

The Court of Sudder Udalut on going into the record of this Suit find that although the Board of Revenue did, in the first instance, on recommendation of the Collector, first Defendant, send orders for the confirmation of the sale of the Mootah in question, yet, before those orders were carried out, the Collector having discovered that fraud had been committed by the purchaser (the Plaintiff, Special Appellant) wrote again to the Board, recommending that the sale should be cancelled; whereupon the Board directed its cancellation accordingly.

Hence the Court of Sudder Udalut are of opinion that the required sanction having thus been withdrawn and never actually declared, the sale in question was incomplete, and must therefore be deemed null and void. Under this view of the case the Court of Sudder Udalut resolve to affirm the Decree of the Civil Judge in Appeal and adjudge the Plaintiff to pay all costs of Suit in all the Courts.

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No. 100 of 1857.

Decree dated 28th October, 1857. *Page* 194, *M. V.*

The Plaintiff sued to recover Rs. 140, the amount of loss sustained by him in consequence of the first Defendant having expelled him from his caste.

The first Defendant pleaded that he had not expelled Plaintiff from the caste, but had merely given notice to certain of the other Defendants that he would not take his meals at their houses in company with the Plaintiff; also that Plaintiff had sustained no loss as sued for.

The Sudder Ameen found that owing to some disagreements the first Defendant had declined to eat in company with the Plaintiff, and that in consequence, the other Defendants had ceased to ask him to their houses; that Plaintiff had no claim for damages on this account; and that the losses the subject of this Suit were merely the charitable donations of the Defendants which they might withhold if they pleased; and for these reasons dismissed the Suit.

On Appeal the Civil Judge reversed this decision and decreed that first Defendant should pay to Plaintiff the amount sued for as he considered it proved the Plaintiff had been turned out of the caste: and that in consequence of the first Defendant declining to meet the Plaintiff, the rest of the caste people had ceased to ask him to partake of their meals and charity whereby he had suffered a loss of income to the amount sued for.

A Special Appeal against this decision was preferred, when the Sudder Udalut observed that the Civil Judge was mistaken in supposing that the Plaintiff had been expelled from his caste as the Moofty's decision showed that the Plaintiff had denied this, which denial was supported by the Special Respondent's (Plaintiff's) assertion to the same effect before the Sudder Udalut. The application was therefore admitted that the Court might determine whether the losses sustained by the Plnintiff, in consequence of the first Defendant's conduct, as alleged, could form the grounds of a Suit for damages.

The Court of Sudder Udalut have taker into consideration the pleas

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urged in this case with the decrees of the Lower Courts, and confirm the original Judgment which had been reversed in Appeal.

The Defendants, in refusing to associate with Plaintiff, did nothing more than what they were fully entitled to do; and to seek damages from parties thus acting, on the plea of loss sustained therefrom, is plainly such a plea for damages as no Court can sustain.

No. 133 of 1857.

DECREE DATED 18TH NOVEMBER, 1857. *Page* 210, *M. V.*

This was a Suit for division of family property; against which it was contended that, the Plaintiff (since deceased) having been for some years afflicted with an incurable disease, was, under the Hindoo Law, rendered incompetent to inherit.

The Lower Courts awarded to deceased's widow, who continued the Suit on behalf of her adopted son, the share of the patrimony sued for, on the ground that the deceased having, while in health, succeeded jointly with Defendant to the enjoyment of the estate, could not, by subsequent illness, be deprived of his inheritance.

A Special Appeal was admitted, in order to determine whether the decisions of the Lower Courts were in conformity with the Hindoo Law, it being alleged on authority "that where the exclusion from inheriting arises not from natural defect, the cause must have arisen previous to the division or descent of the property, as, if it do not occur till afterwards, the succession is not divested by it."

On hearing the case, the Sudder Udalut deemed it necessary to put the following question to their Law Officers:—"A and B are undivided brothers, for years in joint enjoyment of family property. Two or three years before his death, A becomes a leper, and, shortly before his death, adopts C. On the death of A can C claim his father's share?"

To this the Pundits replied;—"the moment A became a leper, he forfeited his right of inheritance, and his adopted son C cannot, therefore, claim A's share."

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In consequence of this declaration of the Law, as it bears upon the present case, it becomes necessary that the Lower Courts should determine precisely, which they have not hitherto done, whether the deceased was, or was not, laboring under a disqualifying disease at the time of his death and of making the adoption. The present judgment proceeds on the supposition that, unless the party was diseased before the succession reached him, which they find not to be the case, the supervention of the malady would not operate: and, therefore, though finding that, if he was diseased, it was not for more than two or three years before his death, they do not say, whether or not he was so diseased.

The Court of Sudder Udalut, therefore, resolve to remand the Suit to the Court of original jurisdiction, with reference to the foregoing observation, in order that this point may be recorded for proof, and further evidence if tendered, be considered; and a decree passed in conformity with the Law applicable to the facts.

No. 134 of 1857.

Decree dated 2nd December, 1857. *Page* 213, *M. V.*

This was an action to compel Defendant to receive from the Plaintiff the amount advanced by the former on the mortgage of two shops, and to deliver up the same to the Plaintiff; accompanied by rent for the period during which the latter had been wrongfully kept out of possession.

The Moofty Sudder Ameen's decree (directing Defendant to deliver up the shops, but disallowing Plaintiff's claim for rent, because he had not deposited the mortgage amount with a third party on Defendant's objecting to receive it,) was reversed in Appeal by the Acting Civil Judge, who required Plaintiff either to sell the shops to the Defendant at the price at which they were valued, or to remove them altogether, on the ground that Defendant's purchase of the site, which, though disputed by Plaintiff, the Acting Civil Judge considered proved, vested Defendant with full control over the buildings standing thereon.

The Moofty Sudder Ameen has found that the Plaintiff made a legal tender of redemption of the Defendant's mortgage; and, as the Acting Civil

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Judge does not object to the original decree on this point, the Court of Sudder Udalut resolve to confirm, with all costs, the Moofty Sudder Ameen's decision; but with the modification of allowing rent, as the tender of redemption rendered the Defendant liable for the same from the date of the tender, and the Plaintiff was not bound, after his tender was refused by the Defendant, to deposit the redemption money with a third party.

No. 135 of 1857.

DECREE DATED 2ND DECEMBER 1857. *Page* 215, *M. V.*

Plaintiff's object in instituting this Suit was to establish his exclusive right to a certain channel, which he had excavated, at his own expense, for the irrigation of some land which he had recently purchased, and which had formerly been watered by a similar channel, long since filled up and rendered useless.

The District Moonsiff's decree, recognizing Plaintiff's exclusive right, was reversed in Appeal, the Civil Judge observing that the channel in question was not mentioned in Plaintiff's bill of sale, and that any prescriptive right the former owner of the land might have once possessed, had long since ceased by reason of disuse and lapse of time; that Defendants had evidently taken part in clearing out the channel; and that, therefore, on no grounds could the Plaintiff be considered to possess an exclusive right to the water.

A Special Appeal was admitted in order to determine whether, the value of the Suit being laid at 15 Rupees, the Judgment of the Moonsiff was not final, under the provisions of Section XLIII, Regulation VI of 1816.

The Sudr Udalut are of opinion that an Appeal was properly admitted against the Decree of the Moonsiff, with reference to Section II, Regulation V of 1825; the property or thing in issue, viz.: the exclusive use and possession of land, used as a water-course, being "land" within the meaning and intent of that enactment.

The Appeal being thus ruled to have been properly admitted, the Sudder Udalut can see no reason for interfering with the decree of the Civil Judge thereon. He has found, on the evidence before him, that Plain-

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tiff (Special Appellant) has failed to prove the exclusive right for which he contended; and the Sudder Udalut, accordingly confirm, with all costs, the decree of the Civil Judge in Appeal.

No. 162 of 1857.

Decree dated 3rd December, 1857. *Page* 216, *M. V.*

This was an action to recover, with interest, a certain sum advanced by the Plaintiff on the mortgage of particular lands, possession of which had never been given in accordance with the terms of such mortgage. Defendant failing to appear, the case was tried ex-parte, and Judgment given for Plaintiff, awarding him the amount he had advanced but a reduced rate of interest.

In Appeal Defendant's plea, that he had not been served with a notice of Suit, was discredited, and the original decree affirmed.

The Sudder Udalut, finding that the requirements of the law had not been fully complied with in this case, issued notice of remand, which the Special Respondent has not opposed.

The Court of Sudder Udalut are of opinion that the words in Section III, Regulation II of 1811, "so that the notice cannot be served upon him," are intended to have the same construction as is more fully explained in Section XXI, Regulation VI of 1816; and that when the Defendant shall refuse to give the required written acknowledgment on the back of the notice, a proclamation should be issued. The Sudder Udalut, therefore, resolve to remand the Suit for the reception of the Defendant's answer, and decision de novo.

No. 163 of 1857.

Decree dated 3rd December, 1857. *Page* 217, *M. V.*

This was a Suit to obtain one-fourth of certain lands in the possession of the Defendants, such portion constituting Plaintiff's share of the patrimonial estate. The first Defendant pleaded that the extent of land had been overstated, and that she had been put to certain law expenses, a proportion of which the Plaintiff ought to bear.

In awarding Plaintiff her share, the Moofty Sudder Ameen excluded from

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his reckoning, a piece of land which had been sold in satisfaction of the public revenue ; but this the Civil Judge brought to account, on the ground that it had been sold through the fault of the Defendant.

The Sudder Udalut, finding that the Appeal decree was defective, issued notice of remand.

The Civil Judge has omitted to notice that all the parties in the original Suit were not entered in the Appeal, so that Appeal must either be set aside for informality, or only considered as far as the rights of the Appeal parties, viz., the ninth Defendant and Plaintiff, were concerned; independently of those of the other parties in the original Suit: whereas the Civil Judge has decided that the first Defendant, who was no party to the Appeal, should have her interests affected, though she had no opportunity of being heard.

The Sudder Udalut, being of opinion that the case has not met with the consideration requisite for forming a correct judgment thereon, resolve to remand the Suit for decision de novo.

No. 141 of 1857.

Decree dated 9th December, 1857. *Page* 219, *M. V.*

This Suit was brought by Plaintiff, the gooroo or priest of the people of the Davanga caste, to establish his right to pass in his palanquin in procession through certain streets and thoroughfares in the town of Salem, accompanied by his disciples, bands of music, banners, &c. He stated that, thus attended, he had hitherto been in the habit of passing through all streets and high roads in the Zillah of Salem, but that on the occasion of his attempting to visit certain houses situated in one of the high roads in Salem, the Defendants had obstructed and prevented him, whereby he had incurred a loss of 700 Rupees, and, further, that his predecessor in the office of gooroo had exercised this right without opposition.

The Defendants pleaded that it was contrary to established custom for the people of Plaintiff's caste to go in procession through streets inhabited by the people of Defendants' caste; and that the matter at issue had already been adjudicated on in Appeal Suit No. 204 on the file of the Subordinate Court, a decree having been passed in that Suit, forbidding

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the previous gooroo to pass in procession through the very street in question.

The Moonsiff decreed in favor of Plaintiff on the grounds that, the street being a thoroughfare, Plaintiff had a right to go through it when and how he pleased, and that not having been a party in Appeal Suit No. 204 he was not debarred by the decree in that case from bringing his present claim.

On Appeal, the Civil Judge, for the reasons assigned in the following paragraphs of his judgment, reversed this decision.

" Plaintiff contends that his predecessor exercised the right to which he now laid claim ; he does not pretend to hold any sunnud or patent proving his right, but rests it on the two grounds, 1st, that the road is a public thoroughfare common to all ; and 2nd, that prior to thirty years ago the right was recognized and exercised by his predecessor. The Defendants on the other hand, while fully admitting the road to be a public thoroughfare, declare the claim set up by Plaintiff to be an innovation, and deny that it has the sanction of custom ; and, further, add, that neither Plaintiff or his predecessor ever went in procession through the disputed locality. In such a matter the onus of proof is clearly with the Plaintiff."

" The Defendants further urge, that the matter of this Suit has been already adjudicated, and file the decrees (documents Nos. 93 and 94) to which they refer. The original decree (document No. 93) denounced by the Moonsiff as inapplicable and " in no way affecting the case in issue," details the grounds for the decision arrived at ; but before discussing the question there raised, it proceeds to define what is a private and what is a public street, and then determined that the particular road, now under litigation, was a public thoroughfare, but at the same time rejects the Plaintiff's claim to procession as not proven, and as not sanctioned by custom."

" In the former Suit the first and 2nd Defendants occupied the same position ; the party preferring the Suit only is different, though of the same caste and sect as the previous Plaintiff ; the right contended for is in reality the same, though in the former case put forward on behalf of the dumb idols, while in the present it is on behalf of the living Sawmy,

Hindoos prevented from playing music in front of a Maho- mosque in a public thoroughfare. S. A. at Calcutta published in D. Times & Mail 16 Jany 1860.
~~[illegible]~~

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but the localities are the same and the interests involved are no less so. The Moonsiff, in at once rejecting the decrees 93 and 94, has avoided a consideration of these points; but if the facts in that and the present Suit are so analogous, it was not competent to a lower tribunal to run counter to the well defined principles on which the decree of a higher Court was founded, and the mere circumstance of the Plaintiff being different, could not set aside those principles which should have guided the Moonsiff in adjudicating on such a question."

"The theory advanced by the Moonsiff to the effect, that the street being a thoroughfare, the Plaintiff and every body is at liberty to use it for their processions, is apparently liberal and tolerant, but is in fact the reverse. While a thoroughfare in a native town is inhabited by persons of all shades of creed and opinion, and this diversity is recognized and acted upon, it is clear the prejudices arising therefrom are to be respected, consistently with equal toleration to all sects and parties; but this consistency would be departed from if a privilege were accorded to one class in direct violence to the admitted and immemorial prejudices of another."

"The question, therefore, is not simply whether the road is a private or public one to which the Moonsiff would limit it, but whether it has hitherto been the custom or right of Plaintiff and his people to carry their processions through such thoroughfare to the annoyance and in violation of the feelings of the other sects or classes residing therein. Now, it is undisputed that, since the year 1810, neither the Plaintiff or his followers, have ever been permitted the privilege; when an attempt has been made, opposition has been raised, and the police have peremptorily put a stop to it, and though these prohibitions of the magistracy carry with them no weight in respect to the right, they incontestably set at rest another important question, namely, that of mamool or custom, on which it appears to the Civil Judge the question of right must altogether depend. It is conceded that Plaintiff, who is priest of his caste, has never till now preferred his claim, while during the last fifty years such claim has never been entertained; hence it is not open to the Court to accord as a privilege, that which is claimed as a right in violation of the feelings and prejudices of others. Plaintiff's right, therefore, not being made out, he is prohibited from going in procession in the locality where he claims that right so to pass."

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Against this decision a Special Appeal was admitted, in order that the principle involved in the case, as to the right of parties to use the public roads for caste processions, might receive the consideration of a full Court.

Before the Court Mr. Mayne contended for the Plaintiff:—" This is merely a question regarding right of way, in a high road or public thoroughfare; if I have the right to go at all, it is no matter, how I go; I may go in a palanquin with a band of music, trumpets, &c., or in any manner that I please. Plaintiff does not claim this right in virtue of his office of gooroo or priest, or because this privilege had been previously exercised by himself or his predecessor; he claimed, as a British subject, a right inherent and inalienable; [this would dispose of the preliminary objection, namely, that Plaintiff's Suit was barred by the statute of limitations, as the prescription would not run from the time he had last exercised his right, but from the time his cause of action arose, which would only be when such right was interfered with.] The magistrates at times may have interfered and no doubt might stop any person or procession passing down the high road, if they had cause to apprehend a breach of the peace; but such prevention could certainly not interfere with Plaintiff's vested rights, and still less would vest any private party with the right to do so. In England such a case could never have come into Court; but even under Hindoo Law it is incumbent on the party who interferes with a common law right, to shew some Hindoo Law or custom, which forbids the exercise of such a right. The Civil Judge would rest the Plaintiff's claim on the right of custom, and would throw the *onus probandi* on him; but this was clearly wrong, as the *onus probandi* clearly lies with the party who seeks to interfere with another's public rights. In the present instance they do attempt to show a custom, but it is neither a legal or laudable one; they claim a right to turn out and stop us passing down the public street; if we resist, they are justified in preventing us at all hazards even by killing us. Now, this is a custom so bad and so opposed to public policy, that no Court could uphold it."

" As regards the objection that the matter at issue has already been adjudicated on in Appeal Suit No. 204 of 1841, the Decree No. 93 shows, and it is also allowed, that Plaintiff was no party to the Suit; and as he does not claim his right through the Plaintiff in that case, his claim

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cannot be barred by any decision in it. But though Plaintiff's claim cannot be affected by it, the principle upon which the Judge in that case founded his judgment we are willing to accept; he first of all showed what is a private and what is a public street, and declared that though there was no thoroughfare through a private street, there was through a public one; and though he decided against the Plaintiff's right to pass in procession through the public street in question, it was on the grounds that it was not advisable as such processions might lead to riot and a breach of the peace; but the *principle* laid down by him is that through a public street, as this is admitted to be, every one has a right to go as he pleases."

"Plaintiff, therefore, sues to establish his inherent and inalienable right, a right that cannot be affected by any law of limitations, or any previous adjudication in a Suit to which he was not a party."

Mr. Dale for the Defendants urged, that this was a question of custom; that the onus of shewing some custom lay with the Plaintiff; that the Judge of the lower Court had found that Plaintiff had failed to prove that by custom he had any such right as that he now sought to establish; also, that claiming through his predecessor in the office of priest, his claim must be barred as having been already decided against in No. 204 of 1841; that the matter at issue was identical with that in the present Suit; that the Decree in it was binding and precluded Plaintiff or any of his caste people from carrying idols through, or, by inference, making any religious demonstrations of any kind in that street.

It is evident that the Plaintiff, in suing for a declaration of right to pass in the manner described, did not intend or desire to set up a "*custom*" warranting his doing that which, failing such "custom," the Defendants might prohibit; but wished simply to assert his natural right, and to pray that Defendants might be restrained from interfering with it. Such right is inherent in every subject of the state not requiring, as the Civil Judge appears to suppose, to be created by "sunnud" or "patent," and it lies upon those who would restrain him in its exercise, to shew some "Law," or "custom having the force of law," depriving him of the privilege.

In the present case the Defendants would urge, that the Plaintiff has

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lost his right under a rule of law, inasmuch as by the Decree of the Acting Subordinate Judge in No. 204 of 1841, other parties of the same caste were forbidden to go through the same street with *idols*. Without entering into the merits of that Decree, or pronouncing how far the Plaintiff might stand affected thereby in the event of his attempting to do the *same* thing, it may suffice to say, that the right therein contended for was the privilege of carrying certain 'idols,' touching which there is no question in this case, the Plaintiff merely desiring to pass in a palanquin with banners and instruments of music, in such way as the magistrate may not object to as dangerous to the public safety. When, therefore, the Plaintiff sought in 1852, to pass through the street in such procession, and Defendants obstructed and prevented him, they did so without any *apparent* grounds, and at their own peril if they could not show their right by law or custom to do so. That they had no such right by Law has been already shown; that they have none by custom, is in the opinion of the Court equally clear. They do not pretend to prove any such by documentary evidence, in the way of ancient ruling, permission by competent authority, or agreement between the parties concerned; they merely assert and prove what the Plaintiff does not care to deny, "that for many years he has not passed through the street;" but the circumstance of an individual not personally using a particular highway for *any* number of years, would not extinguish his right to use it whenever he pleased. The Court of Sudder Udalut, therefore, resolve to reverse the Decree in appeal, and to affirm that of the Moonsiff, ordering that Defendants pay all costs in Appeal and Special Appeal.

No. 172 of 1857.

Decree dated 21st December, 1857. *Page 227, M. V.*

This was an action for damages, arising out of the unwarranted act of the first Defendant, in marrying, in his capacity of Cauzee, the third Defendant, Plaintiff's wife, to the second Defendant, during Plaintiff's absence in the course of trade.

The Defendants pleaded that Plaintiff had neglected to make provision for his wife for years before; and that it was her wish to be married to the second Defendant.

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The Moofty Sudder Ameen held that the first Defendant was not justified in acting as alleged, unless it was shown that Plaintiff had left his wife in a state of indigence; and finding that such had not been proved, the Moofty awarded Plaintiff Rs. 150, damages.

The Civil Judge considered that the first Defendant had made due enquiry, prior to divorcing the third Defendant from the Plaintiff and marrying her to the second Defendant; and he, accordingly, dismissed the Suit.

As the Sudder Udalut doubted the correctness of the Civil Judge's opinion, respecting the provisions of the Mahomedan law, as applicable to the case, the following question was put to the law officer:—"If a man abandon his wife for many years, and cease to provide for her maintenance, can a Cauzee, on the application of the wife, divorce the wife from her husband?" To which the law officer replies: "Under the circumstances mentioned in the question, the Cauzee is not authorized to pronounce a divorce between the wife and her husband; but the wife can, under the Mahomedan law, obtain justice by lodging a complaint against her husband for maintenance and for a house to live in.—Vide Futwa-i-Aulumgherry."

As, under the above exposition of the law, it is clear that the Moofty was correct in considering the divorce to be illegal, and that the Plaintiff had grounds for his action for damages, caused by the said illegal divorce, the Sudder Udalut resolve to remand the Suit, in order that the Civil Judge may pass a decision on the correctness of the Moofty's opinion respecting the amount of damages to be awarded.

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